93-128
No.

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

J. MICHAEL STOLTZ, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF J.P. STOLTZ, DECEASED,

Petitioner,

vs.

FIRST PYRAMID LIFE INSURANCE COMPANY OF AMERICA, *et al.*,

Respondents.

Petition for Writ of Certiorari to the Arkansas Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Petitioner's due process rights, and in particular a litigant's right to a fair and impartial review, were violated when the author of an Opinion overturning a $10,000,000 jury verdict in favor of the Petitioner failed to disclose a substantial longstanding social relationship with an interested party that benefited from said decision, and who furthermore engaged in private in-state and out-of-state social functions and accepted gifts from said interested party while this matter was pending before him on appeal.

II. Whether the Petitioner's right to due process was violated by the Arkansas Supreme Court's failure to:

(a) Disclose the true extent and nature of its Chief Justice's long standing social relationship with the senior partner of an interested party;

(b) Alternatively, appoint an independent Special Master to investigate the nature and extent of said relationship, and disclose same to all interested parties;

(c) Stay the issuance of its mandate pending a formal inquiry into the nature of said relationship by the Arkansas Judicial Discipline and Disability Commission;

(d) Recuse and disqualify himself from deciding a Motion requesting a formal inquiry into said relationship, even after its Chief Justice publicly commented on the merits of same while said Motion was pending.

III. Whether the Petitioner's right to due process was violated by the failure of the State of Arkansas to require notice, as established by the United States Supreme Court in *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 108 S. Ct. 1340, 99 L. Ed. 2d 565 (1988).

LIST OF ALL PARTIES TO THE PROCEEDINGS

The Plaintiff in the action from which this Petition arises was J. Michael Stoltz, nominated as the Special Administrator of the Estate of J.P. Stoltz, deceased, to pursue this cause of action on behalf of said Estate due to a conflict of interest between the pursuit of same by the appointed Executor, J. Stephen Stoltz, and his failure to pursue said claim on behalf of the Estate. The Defendant in said proceedings Was First Pyramid Life Insurance Company of America. Since no party to the action below was a corporation, there are no parent or subsidiary corporations to disclose.

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OPINIONS BELOW

On December 21, 1992, the Arkansas Supreme Court entered an *Opinion* which reversed and dismissed a jury verdict totalling approximately $10,000,000 to the Estate of James Patrick Stoltz, deceased, claiming same was barred by limitations. (Appendix at 1a-9a). After said Opinion was rendered, the Petitioner ascertained that a substantial social relationship existed between the author of the aforementioned Opinion, and the senior partner of an interested party in the trial court proceedings, and that private trips and excursions between these two individuals had transpired while this matter was pending on appeal before the Arkansas Supreme Court. On January 19, 1993, the Petitioner filed a *Motion For Vacatur, To Disqualify And, In The Alternative, To Appoint A Special Master.* Said Motion was denied by *Order* dated February 5, 1993. (Appendix at 10a). The Petitioner filed a *Petition For Rehearing* before the Arkansas Supreme Court, and same was denied by *Order* dated February 22, 1993. (Appendix at 27a-28a). The Petitioner had filed a *Motion For Stay*, requesting that the Arkansas Supreme Court not render a decision on the *Petition For Rehearing* until after the Arkansas Judicial Discipline and Disability Commission had investigated a Complaint filed by the Petitioner against the Chief Justice for the aforementioned social relationship, and his failure to recuse or disclose same. (Appendix at 12a-26a). Said Motion was denied by *Order* dated February 22, 1993. (Appendix at 27a-28a). The Petitioner filed a *Motion For Stay Of Mandate* on February 22, 1993, pending a prosecution of these proceedings to the Supreme Court of the United States. (Appendix at 29a-31a). Said Motion was denied on March 15, 1993. (Appendix at 40a). Finally, the Petitioner filed a *Motion To Supplement The Record* on March 12, 1993, seeking to document the fact that the record in the lower court proceedings was not reviewed by the Arkansas Supreme Court subsequent to the court's Opinion on December 21, 1992. Said Motion was denied by *Order* dated April 5, 1993. (Appendix at 32a-39a). The Mandate was entered on March 15, 1993. (Appendix at 40a).

STATEMENT OF JURISDICTION

The Opinion of the Arkansas Supreme Court was rendered on December 21, 1992; that court denied the *Petition for Rehearing* on February 22, 1993. This Court granted the Petitioner's *Application For Extension Of Time In Which To File A Petition For Writ Of Certiorari* by *Order* dated May 20, 1993. (Appendix at 46a). Since the time during which it might be filed expires on July 22, 1993, this Petition is timely, and this Court has discretionary jurisdiction to consider this case pursuant to 28 U.S.C. §§ 1257(2) and (3).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

This case implicates the due process clause of the Fourteenth Amendment to the Constitution of the United States, which provides:

> **Citizenship — Due process of law — Equal protection.**
>
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property , without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV.

This case also involves the construction of pertinent canons from the Arkansas Code of Judicial Conduct. Said canons read, in pertinent part, verbatim, as follows:

Canon 1:

> An independent and honorable judiciary is indispensable to justice in our society.

Canon 2:

> A Judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. A Judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment.
>
> Commentary: Public confidence in the judiciary is eroded by irresponsible or improper conduct by Judges. A Judge must avoid all impropriety and appearances of impropriety. He must expect to be the subject of constant public scrutiny. He must therefore accept restrictions on his conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

Canon 3C:

> DISQUALIFICATION: 1. A Judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where he has a personal bias . . . .

> (d) REMITTAL OF DISQUALIFICATION: A judge disqualified by the terms of Canon 3C(1)(c) or 3C(1)(d) may, instead of withdrawing from the proceeding, disclose on the record the basis of his disqualification. If, based on such disclosure, the parties and lawyers, independently of the Judge's participation, all agree in writing that the Judge's relationship is immaterial or that his financial interest is insubstantial, the Judge is no longer disqualified, and may participate in the proceeding. The agreement, signed by all parties and lawyers, shall be incorporated in the record of the proceeding.

Canon 5:

> A Judge may . . . engage in the arts, sports, and other social and recreational activities, if such avocational activities do not detract from the dignity of his office or interfere with the performance of his judicial duties.

STATEMENT OF THE CASE

Petitioner is mindful of Rule 14(g) of the Rules of this Honorable Court, and will make his Statement of the Case as concise as possible. The basis for this Petition is basically simple: A Supreme Court Justice should not socialize with an interested party while a case is before him on appeal, without at least divulging same on the record so all parties can respond accordingly. However, there is a convoluted factual pattern that must be set out in some detail for this Court to be able to appreciate why it should agree to hear this case.

First Pyramid Life Insurance Company of America (hereinafter referred to as First Pyramid or FPL) wrote two policies of life insurance totalling $2 million on the life of J.P. Stoltz, deceased. The contractually designated beneficiary was found by a jury to be his Estate. There was conflicting evidence regarding whether the deceased insured wanted his eldest son, J. Stephen Stoltz, or his Estate, to be the beneficiary, but as a matter of contract, on paper, in black and white, the Estate was the designated beneficiary.

J.P. Stoltz died in December, 1977. The Friday, Eldredge & Clark Law Firm (a/k/a the Friday Law Firm or the Friday Firm) was appointed the attorneys for the Estate shortly thereafter. First Pyramid realized it had a problem when the insured died due to the manner in which it had handled its paper work. The confusion concerned the entity it should pay as the proper beneficiary. It called in its attorneys (not the Friday Firm at that time) for advice on what it should do. Both of its in-house attorneys recognized the beneficiary discrepancy, and advised it through written memos that interpleading the money was the safest course of action to take, but that said action would "alert" the losing party to its potential claim, and could subject, or expose, the insurance company to a lawsuit from the loser. This "discrepancy in the proper beneficiary" was not, at any time, passed on to the Estate by the insurance company.

On the same date it received these memos from its attorneys, the insurance company allegedly had a meeting, wherein the alternative of interpleading the money, and its concurrent exposure to a lawsuit by the loser, was discussed. First Pyramid decided to pay the son, *because he was the only one who had made a claim for the proceeds, and was the only one who thought he had a claim to the proceeds.* The Estate was never told it had a potential claim to the proceeds. The insurance company decided that, if it was subject to being sued by the loser if it alerted all parties to their potential

claim, it would be better off paying the son, who knew he had a claim, and had made a claim, and take its chances that the other entity with a claim to the proceeds, *i.e.*, the Estate, would never find out about same.

When the members of the Estate found out the Estate was the rightful beneficiary, yet had not received the proceeds, a lawsuit was instituted. On August 10, 1991 a Pulaski County, Arkansas jury returned a multi-million dollar verdict in favor of the Petitioner, who had been appointed Special Administrator of his father's Estate in order to pursue this cause of action. First Pyramid filed a Notice of Appeal on September 10, 1991.

The Arkansas Supreme Court overturned a jury's finding of fact, *i.e.*, that fraud sufficient to toll the limitations period was present, same being presented to the jury without objection and by virtue of an instruction co-authored by the parties' respective counsel, in an Opinion rendered on December 21, 1992, and reversed and dismissed this lawsuit. Approximately one week after that decision came down, the Petitioner was apprised that a substantial and unique social relationship, of long standing duration, existed between the Chief Justice of the Arkansas Supreme Court, who authored the Opinion, and members of the Friday, Eldredge & Clark Law Firm (the largest law firm in the State of Arkansas), including, but not limited to, Herschel Friday, that firm's senior partner. The Petitioner also became apprised that said social relationship included, but was not limited to, quail hunting through the years on Mr. Friday's private farm located near Mayflower, Arkansas, and on leases located in the State of Texas secured by him and Chief Justice Holt.

While the Friday Firm was not an actual party to the aforementioned litigation, a review of the record unequivocally indicates it was an interested party, and had a vested interest in the jury verdict of the lower court being overturned.

The Friday Law Firm represented J.P. Stoltz while alive, Steve Stoltz as Executor of the Estate, Steve Stoltz individually, the Estate itself, First National Bank of Little Rock, (hereinafter referred to as First National Bank) as the largest creditor of the Estate, First National Bank as the Trustee to which the insurance company proceeds would have flowed had the Estate been paid, the Defendant insurance company itself, Polyvend Corporation (a multi-million dollar family-owned corporation and the largest asset of the Estate), and the insurance agency which sold the policy to the deceased, at all pertinent times. Herbert Thomas, who owned the insurance company, was a large stockholder of the Bank. William H. "Buddy" Sutton, one of the senior partners of the Friday Law Firm, was on the Board of Directors of the insurance company. Herschel Friday, the senior partner of the Friday Law Firm, was on the Board of First National Bank. Within six (6) days after Steve Stoltz was paid these proceeds, he bought $3,000,000 worth of insurance from First Pyramid, and arranged the purchase of large First Pyramid Life policies for two of the employees of Polyvend, the corporation he took over from his father.

The IRS included the $2 million worth of insurance proceeds in the deceased's Estate, forcing the Estate to pay the tax on money it did not receive. The Friday Law Firm sued the IRS for a refund on behalf of the Estate. During the IRS litigation, the Friday Firm tendered to the IRS certain First Pyramid Life files regarding these policies, but only after whiting out certain portions. The IRS ultimately settled the case for almost what it claimed in the first place, and chastised the Friday Firm, for whiting out certain portions of these files. The IRS furthermore told the Friday Firm it had not proven that the Estate was not in fact the prior beneficiary of these policies. The Friday Firm was legal counsel for the insurance company also at this time, and had members on its board. Accordingly, the aforementioned actions were done to protect First Pyramid as much as to benefit the Estate.

The Friday Firm reviewed First Pyramid's files pertinent to these policies in November of 1979. There is conflicting evidence regarding whether or not Steve Stoltz was ever told of the Estate's potential claim to these proceeds. A letter from the Friday Firm dated June 7, 1983 to him, indicated the Estate had a potential claim, but also had language to the effect that they had not reviewed the entire insurance company file. Additionally, this letter appears to be advising him "individually," regarding the proper use of the money he had received "individually." Two members of the Friday Firm both testified at trial that no other member of the Estate was ever told by First Pyramid Life it had a potential claim to these proceeds. Steve Stoltz testified at trial that everything he did was upon the advice of the Friday Firm, and that had he been told the Estate had a claim to these proceeds he had received, he would have notified the beneficiaries of the Estate to their potential claim and otherwise responded accordingly.

No distributions of any kind have been made in this Estate, and said Estate has been the subject of numerous lawsuits filed in numerous forums. The First National Bank of Little Rock, the named Trustee for certain minor beneficiaries of the Estate, testified through trust officers that it would have pursued this matter on behalf of the Estate had it been told the Estate had any potential claim to these proceeds. First Pyramid Life's in-house counsel (not the Friday Firm at that time) advised it in January of 1978 of said Trustee's probable actions if the Bank were apprised of the Estate's claim. Still, the Estate was not apprised at any time of the claim through proper channels.

The conflicts between the son receiving this money individually, and serving as Executor of the Estate, were noted by the Friday Firm in its files, yet the Friday Firm took no actions to apprise the Estate, or the Trustee, of the Estate's claim. The son was required to sign an Indemnity Agreement when he received these proceeds. The only time First Pyramid Life had an individual sign

an Indemnity Agreement was when it was afraid someone else had a claim to the policy proceeds, and wanted to reduce its exposure.

Sometime around September of 1987, several members of the Estate began to question the way the Estate was being managed by the Friday Law Firm and Steve, whom said firm was "advising" individually. They secured the services of new attorneys to assist them in investigating the management of the Estate, and were apprised, for the first time, on August 8, 1988, that the Estate had a potential claim to these proceeds, or that Steve Stoltz had been paid instead of the Estate. Approximately one month later, the Friday Firm was removed as the attorneys for the Estate.

The lawsuit in question was filed by the Estate on April 20, 1989 against First Pyramid Life. The insurance company raised limitations as a defense, and claimed that the Friday Law Firm, as attorneys for the Estate, had knowledge of the Estate's potential claim, and that said knowledge was imputed to the client, or the Estate. The Estate rebutted this argument by arguing that the Friday Law Firm had irreconcilable conflicts of interest which prevented the imputation of knowledge to the Estate, and at trial there was no evidence that the Estate itself had actual knowledge that it had not been paid the insurance proceeds in question. The Friday Law firm was approached by the Petitioner, and would have been made a party to this litigation but for the fact that it executed a Tolling Agreement which tolled the statute of limitations while litigation against the insurance company was pursued.

Immediately upon learning that the Chief Justice of the Arkansas Supreme Court had a long standing and close friendship with the Friday Law Firm, the Petitioner instructed his attorneys to investigate same. During said investigation, the Petitioner learned that said friendship was of long standing duration, and that the Chief Justice had hunted with Mr. Friday, or on Mr. Friday's land at his invitation, through the years, including two occasions while

this matter was pending on appeal; once on Mr. Friday's private farm in Arkansas, and once on private leases in the State of Texas.

The Petitioner filed a Motion requesting that the Opinion be vacated, that the nature of the relationship be fully disclosed, that, alternatively, an independent Special Master be appointed to ascertain the nature of same, and that the entire court recuse and have the Governor appoint seven (7) Special Justices to hear the case in accordance with prior Arkansas precedent. The Petitioner also sought to stay further movement in these proceedings on the merits until after the aforementioned "sought after" facts were disclosed. All such Motions were denied.

The Petitioner vigorously argued that his constitutional due process right to a fair and impartial hearing would be violated absent a disqualification of the Arkansas Supreme Court, and that the Estate's property was being taken without due process of law, as mandated by the notice requirements of the United States Constitution, and as interpreted by decisions from the United States Supreme Court. It is out of this factual scenario that the Petitioner turns to this Court for relief.

REASONS FOR GRANTING THE WRIT

I.

THE PETITIONER'S DUE PROCESS RIGHTS, AND IN PARTICULAR A LITIGANT'S RIGHT TO A FAIR AND IMPARTIAL REVIEW, WERE VIOLATED WHEN THE AUTHOR OF AN OPINION OVERTURNING A $10,000,000 JURY VERDICT IN FAVOR OF THE PETITIONER FAILED TO DISCLOSE A SUBSTANTIAL, LONG STANDING SOCIAL RELATIONSHIP WITH AN INTERESTED PARTY THAT BENEFITED FROM SAID DECISION, AND WHO FURTHERMORE ENGAGED IN PRIVATE IN-STATE AND OUT-OF-STATE SOCIAL FUNCTIONS AND ACCEPTED GIFTS FROM SAID INTERESTED PARTY WHILE THIS MATTER WAS PENDING BEFORE HIM ON APPEAL.

Rule 27 of the Rules of the Arkansas Supreme Court provides the method to be followed "whenever it is desired to suggest disqualification of a Judge of this case in the case to be submitted . . ." Rule 23 of the Rules of the Arkansas Supreme Court provides for the procedure to be followed "in cases where no provision is made by statute, or if not covered by other rules, . . ." and states in those instances that this court shall follow a procedure in accordance "with the practice heretofore existing."

In this instance, the substantial and long standing social relationship between Chief Justice Jack Holt, Jr. and the Friday Law Firm was not brought to light until after the Supreme Court had rendered its original decision on the merits in these proceedings. The case of *Johnson v. Sturdivant,* 295 Ark. 622, 758 S.W. 2d 415 (1988), involve a similar situation, wherein Justice Purtle wrote an Opinion for a 6-1 majority when he had a personal claim pending against Farmers Insurance Company, the insurer of one of the tangential Defendants in a lawsuit involving multiple

Defendants. The Appellant in that case, Georgia Pacific, asked not only that Justice Purtle recuse, but that the remaining Justices consider disqualifying in view of the decision of the Supreme Court in the *United States and Aetna Life Insurance Company v. Lavoe,* 475 U.S. 813, 106 S. Ct. 1580, 89 L. Ed. 2d 823 (1986), and the more recent decision in *Lilejeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988). In *Sturdivant,* at 416, Justice Hickman wrote:

> We would not presume Justice Purtle intentionally erred or knew Farmers Insurance was involved in this lawsuit, *but it was his duty as the Judge assigned to write the Opinion to know it. His personal legal business should never conflict with his role as a justice, and it is his duty, not ours or others, to see to that.* (emphasis added).

In *Sturdivant,* Justice Purtle makes the point that there was no suggestion of disqualification made before the case was submitted. However, it was obvious the facts supporting a suggestion of disqualification were not discovered until after the decision was rendered. Accordingly, Rule 23 provided the "practice heretofore existing." Also, Justice Purtle indicates:

> I had no knowledge that Farmers Insurance Group had any interest in this case until I was informed of the Motion and Petition by a newspaper reporter who had received copies of these documents before I did.

He also indicates that he did "absolutely nothing improper or unethical." The Arkansas Supreme Court reasoned in *Sturdivant,* and in accordance with its Rules and the Arkansas Code of Judicial Conduct, that that was not the issue. The *appearance* of an

impropriety, or a situation where the impartiality of a Judge could *reasonably be questioned* is the test.

Chief Justice Holt may not have known of the depth of the Friday Firm's involvement until he got involved in these proceedings. However, a reading of the record makes it absolutely, unequivocally clear that the Friday firm has a stake in this lawsuit. Furthermore, Justice Corbin pointedly asked from the bench during oral arguments, "Why haven't you sued the Friday Firm?" The Friday Firm's involvement is apparent to any reader of the record. Conversely, there is compelling evidence that the Chief Justice neglected to ever read the record in these proceedings.

The Arkansas Code of Judicial Conduct deals specifically with the need for a judge to avoid the *appearance* of bias or partiality.

Canon 1 begins:

> An independent and honorable judiciary is indispensable to justice in our society.

Canon 2 reads in part:

> A Judge . . . should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. A Judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment.
>
> Commentary: Public confidence in the judiciary is eroded by irresponsible or improper conduct by Judges. A Judge must

> avoid all impropriety and appearances of impropriety. He must expect to be the subject of constant public scrutiny. He must therefore accept restrictions on his conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

Canon 3C reads as follows:

> DISQUALIFICATION: 1. A Judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where he has a personal bias . . . (d) REMITTAL OF DISQUALIFICATION: A Judge disqualified by the terms of Canon 3C(1)(c) or 3C(1)(d) may, instead of withdrawing from the proceeding, disclose on the record the basis of his disqualification. If, based on such disclosure, the parties and lawyers, independently of the Judge's participation, all agree in writing that the Judge's relationship is immaterial or that his financial interest is insubstantial, the Judge is no longer disqualified, and may participate in the proceeding. The agreement, signed by all parties and lawyers, shall be incorporated in the record of the proceeding.

Chief Justice Holt did not disclose any social relationship between himself and the Friday Law Firm. If he had, he would have been respectfully asked, in accordance with these rules, to recuse.

Canon 5 states:

> A Judge may . . . engage in the arts, sports, and

> other social and recreational activities, if such avocational activities do not detract from the dignity of his office or interfere with the performance of his judicial duties.

This same Canon states that a judge should not accept gifts, and that if he does accept gifts over $100, he must disclose same. Petitioner finds it hard to believe that hunting private, pen raised quail through the years, including but not limited to while this matter was pending on appeal, on a private ranch complete with a hunting lodge said to be elaborate and elegant, over an extended hunting season much longer than that allowed by the Arkansas Game and Fish Commission to the ordinary citizen, coupled with trips to the State of Texas to hunt on privately leased lands, do not rise to the level of gifts.

The Arkansas Supreme Court has interpreted its own rules in *City of Jacksonville v. Venhaus,* 302 Ark. 204, 788 S.W. 2d 478 (1990) and *Patterson v. R.T.,* 301 Ark. 400, 784 S.W. 2d 777 (1990), and quotes many of the aforementioned Canons and Rules. It is unequivocally the law that:

> The proper administration of the law requires not only that Judges refrain from actual bias, *but also that they avoid all appearances of unfairness.* (emphasis added).

See Venhaus at 480, citing *Bolden v. State,* 262 Ark. 718, 561 S.W. 2d 281 (1978). The rules applicable to the Justices of the Federal bench are virtually identical. *See* 28 U.S.C. § 455. The standard is an objective one. *United States v. Conforte,* 624 F.2d 869, *cert. denied*, 449 U.S. 1012.

The Respondent will argue that the Friday Firm was not an interested party, and did not stand to gain from a reversal of the

Opinion against the insurance company. In the first place, whether or not an entity is an interested party is not governed by whether said party gained or lost ground by the decision after the fact. In the second place, the Friday Firm, which is currently being sued by the Estate, was subject to being sued for a pattern of mismanagement regardless of the outcome of the insurance litigation.

Additionally, if the Arkansas Supreme Court's Opinion stating that "notice" to Rita Fields and Jack Smith, two elderly heirs, somehow binds the "Estate" holds up, the Friday Firm will surely raise this argument in the suit currently pending against them. (Note: Such a holding is totally improper, and repugnant to established law, but is not argued substantively at this time in this Petition. (*See Whelan v. Edwards*, 31 Ark. 723 (1877), Arkansas Code Annotated § 28-1-112; *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 108 S. Ct. 1340, 99 L. Ed. 2d 565 (1988), citing *Mellane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950) and *Menonite Board of Missouri v. Adams*, 462 U.S. 791, 103 S. Ct. 2706, 77 L. Ed. 180 (1983); *Page on Wills*, §§ 2739, 2642; *Sowell v. Housman*, 207 Ark. 929, 183 S.W. 2d 511 (1944)).

Also, it was the insurance company itself that first argued that the Friday Firm was guilty of improprieties when it moved for Summary Judgment (based on limitations) because the Friday Firm had reviewed the insurance company's files and should have picked up on the Estate's claim. Partners of the Friday Firm testified that their review of the insurance company's files led them to believe Steve Stoltz was the proper beneficiary, although the Friday Firm also represented First Pyramid at this time, had firm partners on its board, and surely did not want to subject its two *other* clients to a lawsuit. The jury's verdict proves the Friday Firm was guilty of mismanagement and erroneous advice at the very least, and helps establish a pattern of same on the part of that firm.

Furthermore, under Arkansas Code Annotated § 16-61-201, *et*

seq., the right to contribution among tortfeasors does not accrue, or arise, until after one tortfeasor has paid more than his or her fair share of the damages sustained by the injured party. A Third Party Complaint seeking contribution from a joint tortfeasor can be filed, notwithstanding the fact that the original limitations period applicable to the Plaintiff's cause of action has already run. *Schott v. Colonial Baking Co.*, 11 F. Supp. 13 (W.D. Ark. 1953). In other words, as the statute is currently written, it is conceivable that First Pyramid Life could bring a cause of action against Friday, Eldredge and Clark for contribution, as a joint tortfeasor whose actions contributed to the loss the Plaintiff sustained, if this verdict is rightfully reinstated and the Petitioner collects on same.

It must also be remembered that First Pyramid sued Steve Stoltz as a Third Party Defendant in the trial court on the Indemnity Agreement he signed. That cause of action was severed, but is viable in the event the Petitioner collects anything from the insurance company. Under those circumstances, Steve Stoltz could bring Friday, Eldredge and Clark into the lawsuit as a third party Defendant in those proceedings because he has testified that everything he did, including what he did with the insurance money in question, was upon the advice of the Friday Law Firm. Letters were introduced into evidence from the Friday Firm to corroborate this testimony.

As ironic as it may be, if First Pyramid or Steve Stoltz brings either of the aforementioned causes of action against the Friday Firm, that firm will have no limitations defense to same because said cause of action will have just recently accrued.

Last but not least, there are intangibles involved over and above the aforementioned tangible realities. Numerous issues involving *res judicata* and collateral estoppel come into focus, and could affect the Friday Firm, one way or the other, in any litigation the Estate pursues against it. Furthermore, no law firm would want

to suffer through the revelation that it chose to do nothing when it came across information that one client it was representing (the Estate) should have been paid money that was improperly paid to another client it was representing (Steve Stoltz) by another client it was representing (First Pyramid). The Friday Firm took the hard road. It did nothing to solve the problem, yet continued to represent each of the aforementioned clients and collect legal fees for same. These insurance proceeds were supposed to have been paid to the Estate, for the benefit of numerous entities, including minor children. Instead, the money went to Steve Stoltz, along with a multi-million dollar company (Polyvend of Conway), a $1.62 million debt owed First National Bank (also represented by the Friday Firm) was retired, and these other children received absolutely nothing from their late father's Estate. The Friday Firm simply created a horrendous mess, and at the heart of same lies this insurance controversy, created by its client (First Pyramid) and not prevented by it.

II.

THE PETITIONER'S RIGHT TO DUE PROCESS WAS VIOLATED BY THE ARKANSAS SUPREME COURT'S FAILURE TO:

(a) Disclose the true extent and nature of its Chief Justice's long standing social relationship with the senior partner of an interested party;

(b) Alternatively, appoint an independent Special Master to investigate the nature and extent of said relationship, and disclose same to all interested parties;

(c) Stay the issuance of its mandate pending a formal inquiry into the nature of said relationship by the Arkansas Judicial Discipline and Disability Commission.

The factual and legal basis for the Petitioner's request that this Court review this matter has been adequately set out in the preceding sections of this pleading. The Petitioner wishes to draw special attention to the fact that he was very constrained and conservative in his allegations of wrongdoing, and potential ethical violations, by the Chief Justice in his pleadings before the Arkansas Supreme Court. Neither he, nor his attorney, is on a vendetta against the Arkansas Supreme Court, where said attorney will have to practice for years to come. He does feel like the Chief Justice should have recused, and feels he is obligated to divulge the full nature and extent of his relationship with the Friday Law Firm so that all parties will know the hand of cards they have been dealt. If the Chief Justice is, as he claims, guilty of no wrongdoing, then so be it. Petitioner is simply after the truth. This Honorable Supreme Court cannot possibly grant every Petition for Writ of Certiorari brought before it. Time constraints, and the volume of Petitions filed, simply prohibit same. One is left to wonder where

the Petitioner stands if the investigation by the Arkansas Judicial Discipline and Disability Commission (which he was forced to turn to, as a last resort, when the Arkansas Supreme Court would not, voluntarily disclose the information sought) reveals significant ethical violations by the Chief Justice, yet the Mandate has been issued in these proceedings and same are deemed closed.

The Petitioner respectfully requested that the Arkansas Supreme Court stay the issuance of its Mandate pending said formal inquiry, yet his Motion for same was denied. The Arkansas Supreme Court, and its Chief Justice, should welcome the opportunity to clear itself. Instead, their actions raised questions about the allegations of sporting events, horse racing, etc. which the Petitioner failed to mention in his pleadings because he had no witnesses who were willing to publicly stand behind their statements to him concerning same, and he was not willing to place speculation and rumors in a pleading, especially when he respected his Chief Justice enough to voluntarily come forward with a full disclosure.

(d) The Petitioner's right to due process was violated by the Arkansas Supreme Court's failure to recuse and disqualify itself from deciding a Motion requesting a formal inquiry into said relationship, even after its Chief Justice publicly commented on the merits of same while said Motion was pending.

This case has received widespread, statewide publicity within the State of Arkansas. Seveal well circulated and read newspaper/ magazines have printed articles, some extensive, on the proceedings. The television news networks have followed the arguments presented before the Arkansas Supreme Court with interest. After the Oral Argument on the Petitioner's *Motion For Vacatur, To Disqualify And, In The Alternative, To Appoint A Special Master, And Motion For Extension Of Time To File Petition*

For Rehearing, the undersigned attorney and the Chief Justice were interviewed by several TV stations in the Little Rock area. The Motion had not been conferenced by the full court, and no decision at that time had been made. The Chief Justice of the Arkansas Supreme Court took the opportunity to lambaste the Motion filed by the Petitioner. He berated same as baseless, unmeritorious, etc. The Petitioner has a tape of same, and can provide it to this Court if necessary. The Chief Justice's comments are an independent basis for the Petitioner's amended ethical complaint against him pending before the Arkansas Judicial Discipline and Disability Commission, *i.e.*, commenting publicly on a Motion under submission.

Finally, the Chief Justice has disqualified himself from any further participation in these proceedings due to the ethical complaints lodged against him. If said ethical complaints are found to be meritorious by the Arkansas Judicial Discipline and Disability Commission, it seems to the Petitioner same would be very supportive of his position that the Chief Justice should have recused at the inception of these proceedings. The question is, where does that leave the Petitioner, legally, at that point in time?

(e) The Petitioner's right to due process was violated by the Arkansas Supreme Court's (1) failure to read the lower court record, or (2) alternatively, failure to accurately read same.

The Arkansas Supreme Court overturned a jury's finding of fact on the supposed basis that the lower court record contained no evidence of fraud perpetrated by First Pyramid, and, therefore, the Petitioner's claim was barred by limitations. It is apparent to Petitioner that the Arkansas Supreme Court either never read the lower court record, or, alternatively, failed to read same accurately.

When representatives of the insurance company met in order

to determine who was the proper beneficiary, they received two memos from their in-house counsel advising them to interplead this money, yet advising them that same would alert the "potential" beneficiary that did not receive the money to its claim, and could subject the insurance company to a lawsuit. The Arkansas Supreme Court's Opinion indicates that a subsequent "meeting," wherein these two memos were presented, occurred approximately one week afer the original meeting at First Pyramid wherein the beneficiary discrepancy was discussed. (Appendix at 3a). Fraud can be inferred, just as any other fact, circumstantially. It is much more probative that the insurance company received memos from its in-house counsel advising it to interplead the money, yet on the *same day* it decided to pay Steve Stoltz, than to believe that the insurance company made this decision one week after the original meeting wherein the beneficiary discrepancy was discussed. The Arkansas Supreme Court's Opinion reads as though the insurance company made a measured decision after a week of reflection, when such is not the case.

Furthermore, the Petitioner's counsel received an extension of time from the Arkansas Supreme Court to file a Supplemental Abstract of the record with his *Motion For Vacatur, et al.*, in order to concisely indicate to the Supreme Court where fraud existed in the lower court's record. The record in these proceedings was over five thousand (5,000) pages. Such was an arduous task. (*See* 47a-60a). The Petitioner subsequently learned that the Arkansas Supreme Court never checked out the record to discern whether or not the dissertation of testimony contained in his Supplemental Abstract was true. Same is accurate, and he has the record to back it up. It is unfathomable to Petitioner that the Arkansas Supreme Court can overturn a jury's finding of fact, presented to the jury on an instruction co-authored by the parties' respective counsel, without objection (Appendix at 61a), without either being in the courtroom to discern the witnesses' demeanor on the stand, and the substance of their testimony, or, without doing the next best thing, *i.e.*, reading the record.

III.

THE PETITIONER'S RIGHT TO DUE PROCESS WAS VIOLATED BY THE FAILURE OF THE STATE OF ARKANSAS TO REQUIRE NOTICE, BEFORE THE TAKING OF PROPERTY AS ESTABLISHED BY THE UNITED STATES SUPREME COURT IN *TULSA PROFESSIONAL COLLECTION SERVICES, INC. V. POPE,* 485 U.S. 478, 108 S. Ct. 1340, 99 L. Ed. 2d 565 (1988).

The Arkansas Supreme Court's Opinion mistakenly states that even if fraud is present, same is somehow cured because two (2) elderly individuals, one an heir of the Estate, and one a possible heir, who may have gotten 1/11th of the income off of the interest from these proceeds during their limited lifetime, had knowledge the Estate was the beneficiary of these life insurance policies, and saw financial statements indicating same, prior to the insured's death. Such a holding violates the due process notice provisions mandated by Amendment Fourteen to the United States Constitution, and the application of same to the probation of Estates, as outlined by *Tulsa Professional Collection Services, Inc. v. Pope,* 485 U.S. 478, 101 S. Ct. 1340, 99 L. Ed. 2d 565 (1988).

In the first place, it has been the rule of law in Arkansas *for more than a century* that any claim on behalf of the Estate must be brought by the Executor or Administrator of the Estate. *Whelan v. Edwards,* 31 Ark. 723 (1877). First Pyramid itself moved for Summary Judgment because the heirs of the Estate were attempting to bring a cause of action to recover these insurance proceeds instead of the Executor. J. Michael Stoltz had to be appointed Special Executor to proceed forward in this lawsuit.

The Estate is an entity in and of itself. Only the Executor, or one appointed Special Executor, can receive "Notice" that can bind

the Estate. Arkansas Code Annotated § 28-1-112. This Court has held that any creditor of the Estate must be give specific and actual notice if their identity is "reasonably ascertainable," and that to take one's property without providing same violates the due process clause of the Fourteenth Amendment to the United States Constitution. *Tulsa Professional Collection Services, Inc. v. Pope,* 485 U.S. 478, 108 S. Ct. 1340, 99 L. Ed. 2d 565 (1988); citing *Mellane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950) and *Menonite Board of Missouri v. Adams,* 462 U.S. 791, 103 S. Ct. 2706, 77 L. Ed. 2d 180 (1983).

Taking this one step further, and assuming for purposes of argument that the aunt and uncle had notice, which is debatable, and that the Uncle by marriage even had a *claim,* which is *unlikely,* no one, not the Arkansas Supreme Court's law clerks nor opposing counsel, could find a case that holds that notice to an elderly aunt and uncle under these circumstances will bind the other children, especially minor children, that make up the Estate. The aunt and uncle testified in rebuttal only to counter First Pyramid's contention that the deceased's intention was to designate the son as beneficiary and alleged comments by him verifying same prior to death. This evidence was not even presented, as the Opinion would read, in the Defendant's case in chief. Perhaps the aunt and uncle cannot receive their share of the income, but that issue should be determined in Probate Court after a thorough trial.

This Arkansas Supreme Court has mistakenly cited an untenable basis for erasing a potential $10 million judgment, without citing any case law, precedent, statutory authority, etc. The leading treatise on Estates, *Page on Wills,* §§ 2639, 2642, cites Arkansas cases and states the following when dealing with probate law and an Estate:

> Notice must be served upon the persons who are specified in the statute which regulate

> notice. The contents of the citation or notice must conform to the requirements of the statute. Without express authority, the entrance of appearance by one heir does not enter an appearance for another heir.

Id. at 87, 88, and 92.

The Arkansas case of *Sowell v. Housman,* 207 Ark. 929, 183 S.W. 2d 511 (1944) is cited as being in conformance with the aforementioned, hornbook rules of law. *See also, Matter of Lacy's Estate,* 126 Cal. Reptr. 432, 54 Cal. App. 3rd 172 (1975) and *Heathagen v. Harby,* 78 Wash. 2d 934, 481 P.2d 438 (1971). These cases are not exactly on point, but the analogy is clear. The Estate is an entity that can only be bound by notice, in the statutorily described manner, to the Executor or Administrator.

Furthermore, First Pyramid offered no proof on the age of these minor children at all pertinent times, much less whether they were incapacitated or incompetent for some other reason. It had the burden of proof on the issue of limitations; said burden does not shift to the Plaintiff because it is obvious from the record we are dealing with minor children. Notice to a minor, by statute, must go through a guardian. *See* Arkansas Code Annotated § 28-65-101, *et seq.*

Finally, Lewis Mathis, an attorney for the Friday Firm, berated and ridiculed the balance sheets in question in his testimony as bogus, and said that *everyone* knew the deceased put what he thought his bankers wanted to see on said documents.

In sum and substance, notice to these two individuals, assuming *arguendo* same existed, would not bind the Estate. Furthermore, whether or not Rita Fields and Jack Smith used due diligence is a question of fact, judicially recognized as such, for the

jury. This issue was presented to the jury without objection. The Arkansas Supreme Court's fall back position is simply untenable.

The Arkansas Supreme Court's Opinion is directly contrary to long established rules of law pertaining to insurance companies and their obligations to those they deal with. It also constitutes state sanctioning of a deprivation of property by the insurance company without proper and constitutionally mandated notice. If a creditor is entitled to adequate notice when their identity and address can be reasonably ascertained, then certainly the known heirs of an Estate, or their Guardians/Trustees, have to receive notice before their property can be taken from them by silence on the part of one with a duty to pay. The Arkansas Supreme Court's "blessing" of this conduct amounts to state action, and violates the Estate's due process rights, and those of the beneficiaries encompassing same. These arguments were raised and vigorously argued by the Petitioner before the Arkansas Supreme Court, and were properly preserved for presentation to this Court.

CONCLUSION

For the foregoing reasons, the Petitioner prays that his Petition for Certiorari be granted.

Respectfully submitted,

CHARLES DARWIN DAVIDSON
Of Counsel
CHARLES PHILLIP BOYD, JR.
DAVIDSON LAW FIRM, LTD.
Attorneys for Petitioner
P.O. Box 1300
Little Rock, Arkansas 72203
(501) 374-9977

OPINION OF THE SUPREME COURT OF ARKANSAS DATED DECEMBER 21, 1992

SUPREME COURT OF ARKANSAS

No. 92-4

Opinion Delivered DEC 21 1992

FIRST PYRAMID LIFE INSURANCE COMPANY OF AMERICA,

APPELLANT,

V.

J. MICHAEL STOLTZ, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF J.P. STOLTZ, DECEASED,

APPELLEE,

APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT,
NO. 89-2464
HON. CHRIS PIAZZA, JUDGE,

REVERSED ON APPEAL; AFFIRMED ON CROSS APPEAL.

JACK HOLT, JR., Chief Justice

The focus in this appeal is whether fraudulent concealment was proven by the Estate of J.P. Stoltz ("Estate") in order to toll the statute of limitations on its claim against the appellant, First Pyramid Life Insurance. We hold that the limitations period was not tolled. Thus, we reverse the finding of the trial court.

The facts leading up to this controversy are as follows. In

1975, J.P. Stoltz applied for life insurance with the appellant, First Pyramid Life Insurance ("First Pyramid"). Since Mr. Stoltz had health problems, he was heavily rated for insurance. First Pyramid felt he was a good candidate for a policy called a Flex 79 Trust. The advantage of this kind of policy is that it allows employers to provide employees with life insurance while making the premiums tax deductible. Through this, Stoltz could have his company, Polyvend, Inc., provide him with life insurance virtually tax free. In order to receive these tax benefits, however, the *owner* of the policy had to be someone other than the insured. Another problem was that at the time of Mr. Stoltz's application, Arkansas had a $50,000 statutory ceiling on the maximum life insurance that could be purchased by an employer for an employee.

To overcome this ceiling, First Pyramid arranged for the Trust to be based in Oklahoma. In this manner Stoltz could purchase two policies totalling $2 million — one $1,950,000 policy and one $50,000 policy. Flex 79 was made the owner of the policies. The insurance applications, completed by Stoltz on December 18, 1975, designated Stoltz as the insured, Flex 79 Trustee as the owners and Mr. Stoltz's estate as the beneficiaries.

In March 1976 Mr. Stoltz sought to change the beneficiary and ownership. In the required change of beneficiary forms, he named his son, James Stephen Stoltz ("Steve"), as beneficiary of both policies and owner of the larger policy. A First Pyramid employee, Elizabeth Oswald, accepted these forms. Yet, these forms were never signed by the policies' owner of record, the Flex 79 Trustee. Ms. Oswald's supervisor, Ron Mason, sent a memo in August 1976 advising Mr. Stoltz's insurance agent that the attempted policy modifications were ineffective without the Trustee's signature and that the policy should be returned to have the invalid forms removed. It is not disputed that Mr. Stoltz did nothing further after August 1976 to change the beneficiary from the estate to his son and that on his balance sheet dated October 5, 1977 (two months

prior to his death), he listed the $2 million insurance as an asset and indicated that his estate was the beneficiary. Mr. Stoltz's signature is on this balance sheet.

Mr. Stoltz died on December 18, 1977. Only his son, Steve, claimed the policy proceeds. Prior to paying the claim, First Pyramid consulted their attorney, Allan Horne. Mr. Horne concluded in a memorandum (the "Horne memorandum") that Steve Stoltz was the legal beneficiary but recommended that the proceeds be interpleaded because of uncertainties in file documentation, including the lack of the Oklahoma trustee's signature on the change of beneficiary form completed by Mr. Stoltz. At an executive meeting with First Pyramid approximately a week later, Mr. Horne concurred that paying the son without interpleader was "the best course." First Pyramid paid Steve Stoltz the entire proceeds of the policies within twenty-one days of his father's death.

Subsequently, there was a dispute with the Internal Revenue Service regarding whether the face value of the policies paid to Steve Stoltz was includable in the decedent's estate. This dispute arose because of a tax provision that dictates that if a gift is made within three years of a decedent's death, the policy is presumed to be in contemplation of death. That gift is put back into the estate for estate tax purposes. The Estate through its attorneys, Friday, Eldredge and Clark, attempted to rebut this presumption. According to Mr. Saxton, the Friday firm attorney who handled the challenge, the procedure for challenging this is to include the policy proceeds in the taxable estate and then pay the tax and file a claim for a refund.

In pursuing this refund, Mr. Saxton requested and received First Pyramid Life's file on the insurance policies at issue. In a June 27, 1983 letter to Steve Stoltz, administrator of the Stoltz estate and recipient of the insurance policy proceeds, Mr. Saxton alluded to

the question of change of beneficiary raised by First Pyramid in 1977 and the Horne memorandum concerning change of beneficiary.

Eleven years after J.P. Stoltz's death, representatives of the Estate brought this action against First Pyramid for negligence, breach of contract, bad faith as well as fraudulent concealment of the proper beneficiaries of the policies.

At trial, a jury found for the plaintiffs and awarded the estate $2 million in compensatory damages and $1 million in punitive damages. The court also assessed attorney's fees for $666,666.67. The court refused to award the twelve percent statutory penalty for unpaid insurance claims.

STATUTE OF LIMITATIONS

First Pyramid Life contends that because the action is barred by the statute of limitations, the trial court erred in denying their motion for judgment notwithstanding the verdict. As we find no evidence of fraudulent concealment on the part of First Pyramid which would toll the statute of limitations, it necessarily follows that the action is barred, and the judgment must be reversed.

Representatives of J.P. Stoltz's estate did not bring this action until April 20, 1989, more than eleven years after the payment of the insurance proceeds to Steve Stoltz and J.P. Stoltz's death.

The statute of limitations on actions to recover on a life insurance policy is five years from the accrual of the cause of action. Ark. Code Ann. § 23-79-202 (1992); 16-56-111 (1987). The limitations period on torts actions is three years. Ark. Code Ann. § 16-56-105 (1987). This court has held that the action accrues upon the death of the insured:

> It is a rule of universal application in the law of insurance that a cause of action arises in favor of the designated beneficiary in a policy of insurance against the insurer upon the death of the insured unless by the terms of the contract the accrual of such cause of action is delayed or some local statute fixes a different time.

United Mutual Life Ins. Co. v. Bransford, 190 Ark. 783, 81 S.W. 2d 17 (1935). *See also* 20A John Alan Appleman, *Insurance Law and Practice* § 11585 (1980).

Representatives of the estate contend that the statute of limitations on this action was tolled by First Pyramid's allegedly fraudulent concealment of the controversy. In response, First Pyramid denies concealment and asserts that the estate knew or should have known of the change in beneficiaries on the policies.

When the running of the limitations period is raised as a defense, the defendant has the burden of affirmatively pleading this defense. However, once it is clear from the face of the complaint that the action is barred by the applicable limitations period, the burden shifts to the plaintiff to prove by a preponderance of the evidence that the statute of limitations was in fact tolled. *Cleveland v. Gravel Ridge Sanitary Sewer Imp. Dist. No. 213,* 274 Ark. 330, 625 S.W.2d 446 (1981); *Rasmussen v. Reid,* 255 Ark. 1064, 505 S.W.2d 222 (1974); *Alston v. Bitely,* 252 Ark. 79, 477 S.W.2d 446 (1972).

During the preliminary phases of the lawsuit below, the trial court made the following findings of fact and conclusions of law:

> The cause [of] action here asserted against the First Pyramid Life Insurance Company is the estate lost the insurance benefits by reason of

> the Statute of Limitations and the company was liable in tort, a bad faith action, on the event of the payment of the proceeds.
>
> To avoid the loss of those causes of action, the plaintiff must prove either the defendant insurance company by its overt acts caused the legal right to be hidden and thereby becomes time barred; or there existed a specific legal relationship between the parties that in and of itself obligated an overt discloser [sic] of the existence of those claims. An insurer/ beneficiary relationship does not seem to create that legal obligation; however on the claim of a factual cover-up, the plaintiff should have its day in Court.

(emphasis added).

We agree with this analysis of the issues; however, we hold that the trial court should have granted First Pyramid's motion for a judgment notwithstanding the verdict because the action was barred by the statute of limitations.

There is simply no evidence of record that First Pyramid attempted to fraudulently conceal, "cover-up" or misrepresent to the estate the problem with determining the proper beneficiary of J.P. Stoltz's insurance policy. Even if there was evidence of fraud on the part of First Pyramid, and there is none, the statute of limitations would still have run on this claim. "Fraud does suspend the running of the statute of limitations, and the suspension remains in effect until the party having the cause of the action discovers the fraud *or should have discovered it by the exercise of reasonable diligence*." (Emphasis in original; citations omitted). *Talbot v. Jansen*, 294 Ark. 537, 744 S.W.2d 723 (1988). *See also*

Walters v. Lewis, 276 Ark. 286, 634 S.W.2d 129 (1982); *Carter v. Zachary,* 243 Ark. 104, 418 S.W.2d 787 (1967); *Williams v. Purdy,* 223 Ark. 275, 265 S.W.2d 534 (1954).

We have said that the "classic language on this point in Arkansas" is:

> No mere ignorance on the part of the plaintiff of his rights, nor the mere silence of one who is under no obligation to speak, will prevent the statute bar. There must be some positive act of fraud, something so furtively planned and secretly executed as to keep the plaintiff's cause of action concealed or perpetrated in a way that it conceals itself. And if the plaintiff, by reasonable diligence, might have detected the fraud, he is presumed to have had reasonable knowledge of it.

Wilson v. GECAL, 210 Ark. __, __ S.W.2d __ (1992) (citations omitted).

As early as 1976, twelve years before the filing of this lawsuit, two of the complaining representatives of the estate, J.P. Stoltz's sister and brother-in-law, Ruth Fields and John R. Smith, were aware that J.P. Stoltz had taken out a $2 million life insurance policy naming his estate as beneficiary. Further, J.P. Stoltz's signed a 1976 balance sheet listed the $2 million insurance as an asset and named the estate as beneficiary. This balance sheet was made available to the beneficiaries. Armed with this information, the beneficiaries of the estate were on notice that the estate was potentially a beneficiary of the insurance policies and by the exercise of reasonable diligence, the parties could have discovered information relating to the policy and its designated beneficiaries.

There is no evidence that the beneficiaries of the estate ever requested First Pyramid's files; nor is there evidence indicating that First Pyramid tried to hide the potential problem with the insurance policies from the beneficiaries. In 1983 the attorneys who represented both the estate and Steve Stoltz requested access to the insurance company's files. First Pyramid readily turned them over. A like inquiry of First Pyramid would, in all probably, have made all files on J.P. Stoltz available to the beneficiaries as well.

The beneficiary's ignorance of their rights does not prevent the operation of the statute of limitations. The statute is tolled only when the ignorance is produced by affirmative and fraudulent acts of concealment. *Atlanta Exploration Inc. v. Ethyl Corp.*, 301 Ark. 331, 784 S.W.2d 150 (1990). The acts of concealment or fraud alleged must have been committed by those invoking the benefit of the statute of limitations. *Dupree v. Twin City Bank*, 300 Ark. 188, 777 S.W.2d 859 (1989).

The estate obviously had notice of the original beneficiary of the policies; the fact that the beneficiaries of the estate failed to act or did not know to act on this knowledge does not toll the statute of limitations. As there was an absence of fraud or concealment on the part of First Pyramid, it was entitled to the benefit of the statute of limitations.

On cross appeal, the appellee, Estate of J.P. Stoltz, complains that the trial court erred in denying the twelve percent statutory penalty provided by Ark. Code Ann. § 23-79-208 (1992) and prejudgment interest. Prejudgment interest is based upon an "improperly disallowed insurance claim." However, since we reverse the trial court's decision to award the proceeds of the policy to the estate, the Estate's argument for a statutory penalty and prejudgment interest has no basis.

Reversed on appeal; affirmed on cross appeal.

Dudley, J., not participating.

ORDER OF THE ARKANSAS SUPREME COURT
DATED FEBRUARY 5, 1993

OFFICE OF THE CLERK
SUPREME COURT OF THE STATE OF ARKANSAS
ARKANSAS COURT OF APPEALS
JUSTICE BUILDING
625 MARSHALL STREET
LITTLE ROCK, AR 72201

February 5, 1993

Charles Phillip Boyd, Jr.
Attorney at Law
P.O. Box 1300
Little Rock, AR 72203-1300

Re: 92-4 First Pyramid Life Insurance Company of America v. J. Michael Stoltz, as Special Administrator of the Estate of J. P. Stoltz, Deceased

Dear Mr. Boyd:

The Supreme Court made the following order in the above styled case today:

> "Appellee's motion for vacatur, to disqualify and, in the alternative to appoint a special master is denied. See concurring opinion this date. Dudley, J., not participating."

Sincerely yours,

s/ Leslie W. Steen
Leslie W. Steen, Clerk

LWS:rh
Enclosure
cc: Peter G. Kumpe
& John E. Tull III
William C. Brazil
Vincent Foster, Jr.
& Michael Booker
Edgar J. Tyler
Robert Keller Jackson

[stamped]
RECEIVED
FEB 17 1993

MOTION FOR STAY
FILED FEBRUARY 18, 1993
WITH EXHIBITS

IN THE ARKANSAS SUPREME COURT

NO. 92-4

FIRST PYRAMID LIFE INSURANCE COMPANY OF AMERICA; USABLE INSURANCE COMPANY

VS.

J. MICHAEL STOLTZ, As Special Administrator of the Estate of J.P. Stoltz, Deceased

MOTION FOR STAY

Comes the Estate, by and through its attorneys, Davidson Law Firm, Ltd., and for its Motion to Stay proceedings does state as follows:

1. The Estate filed a *Motion for Vacatur, To Disqualify And, In The Alternative, To Appoint A Special Master* due to serious questions that had come to light concerning Chief Justice Jack Holt, Jr., being a regular quest of Mr. Herschel Friday of the Friday Law firm, and hunting excursions that had taken place through the years, including the period of time this matter was pending on Appeal. The basis for said Motion has been exhaustively briefed, and will not be spelled out herein again.

2. We are not dealing with a "casual social friendship" where pleasantries are exchanged during meetings that occurred by happenstance, or because a Judge and litigant/lawyer are members

of the same group or organization. The Estate prayed that Special Master be appointed to investigate fully the nature and depth of the relationship between Mr. Friday and Judge Holt, the number of times Judge Holt has been a personal *guest* on Mr. Friday's property, as well as the nature and extent of other activities these individuals have partaken in evidencing same. The Estate believes it has the right, under these circumstances, to learn the full extent of the true facts concerning same, while at the same time stating the activities spelled out in the prior pleadings mandate a recusal in and of themselves. The Estate purposefully refused to include hearsay, rumors, and innuendos regarding same in its pleadings, and numerous requests from the media to comment on these proceedings, choosing instead to await the true facts.

3. The Supreme Court, in a "Concurring Opinion" written by Judge Holt, refused to grant the Motion, and refused to appoint a Special Master. A Motion for Reconsideration of said Opinion is being filed contemporareously with this pleading.

4. J. Michael Stoltz, as Special Administrator of the Estate of J.P. Stoltz, has filed a Complaint with the Arkansas Judicial Discipline & Disability Commission against Chief Justice Holt, alleging as a basis for same that Judge Holt's relationship and personal outings with Mr. Friday mandated that Judge Holt recuse himself from further participation in these proceedings, and that his refusal to do so, compelled with the fact that he is the author of the December 21, 1992 Opinion, is a violation of the Arkansas Code of Judicial Conduct. This Commission has the ability to investigate this matter under power of subpoena, and can in essence perform an independent investigation into the matters raised by the Estate in support of their Motion for Vacatur. In other words, the Commission can perform the same task as a Special Master. A copy of Mr. Stoltz's Complaint is attached hereto as Exh. A.

5. The Estate respectfully states that this Court should not render a decision on the Petition for Rehearing until the Arkansas Judicial Discipline & Disability Commission has had the opportunity to investigate this matter, and apprise all parties of the true facts concerning same. If the Commission finds that Judge Holt should have recused, or that an ethical violation has occurred, same would cause one to seriously question the validity of this Court's Opinions in these proceedings. One can only wander where the parties would stand if the Commission were to make such a ruling after the Petition for Rehearing was decided by this Court, thus ending these proceedings.

6. The only alternative for the Estate is to seek an injunction in Federal Court staying further action by this Court until the Arkansas Discipline & Disability Commission has conducted its inquiry. The Opinion from this Court denying the Motion for Vacatur was not received by the undersigned until Wednesday, February 17, 1993, which has afforded him only limited time to investigate said procedure. There is precedent for such an action, but same would undoubtedly bring further publicity to these proceedings which the undersigned counsel would hope to avoid by this Court voluntarily agreeing to stay these proceedings pending the aforementioned inquiry.

7. The failure of this Court to voluntarily stay further actions in these proceedings would constitute a potential denial of due process and the 14th Amendment to the U.S. Constitution, and a potential denial of a fair and impartial opportunity by the Estate to be heard before this Court. If there is nothing to be gleaned from the inquiry of the aforementioned Commission, then this Court should welcome the opportunity to be exonerated in the eyes of all those watching these proceedings.

8. Attached hereto as Exh. B is an Affidavit in accordance with Rule 3 of the Rules of the Supreme Court.

WHEREFORE, the Estate respectfully prays that this Court stay further proceedings in this matter, and voluntarily agree not to render a decision on the Petition for Rehearing until after the Arkansas Judicial Discipline & Disability Commission has fully investigated the Complaint filed by J. Michael Stoltz against Chief Justice Holt, and, in the alternative, to stay same pending an opportunity for a thorough investigation into potential Federal Court intervention, and for all other relief to which it is justifiably entitled.

Respectfully submitted,

DAVIDSON LAW FIRM, LTD.
P.O. Box 1300
Little Rock, Arkansas 72203-1300
Telephone: (501) 374-9977

By: s/ Charles Phillip Boyd, Jr.
Charles Phillip Boyd, Jr.
Bar No. 82023

CERTIFICATE OF SERVICE

I, Charles Phillip Boyd, Jr., do hereby certify that the above and foregoing has been mailed by ordinary mail with sufficient postage affixed thereon, on this the 18th day of February, 1993, to:

Peter G. Kumpe
Williams & Anderson
400 Rogers Building
111 Center Street
Little Rock, AR 72201

s/ Charles Phillip Boyd, Jr.
Charles Phillip Boyd, Jr.

CPBjr:emk:2066B

EXHIBIT A

Arkansas Judicial Discipline & Disability Commission
Tower Building - Suite #1060 - 323 Center Street
Little Rock, Arkansas 72201
Phone: (501) 682-1050

COMPLAINT

I hereby request an investigation of Judge Jack Holt, Jr. of the Arkansas Supreme Court in Little Rock, Pulaski, Arkansas.

On information and belief, I state that the above-named judge:

_X_ 1. Has engaged in unethical and improper conduct as a judge.

* * *

_X_ c. Conflict of interest/failure to disqualify

_X_ 2. Has willfully or persistently failed to perform an official duty by:

* * *

_X_ c. Abuse of judicial power
(includes a knowing or persistent disregard of clear law or fundamental rights)

_X_ d. Legal error/improper procedure
(includes dissatisfaction with court procedures or rulings on evidence, criminal sentences, custody, etc.)

* * *

__x__ f. Procedural or administrative irregularity

__x__ 3. Has engaged in gross *personal* misconduct.

__x__ a. Misconduct (off the bench)
(includes prohibited charitable, business, personal, political or criminal conduct)

* * *

__x__ 6. Other (specify). See enclosed pleadings of my attorneys.

Date: Through the years and while appeal was pending

* * *

Location: Unknown

* * *

Name: *J. Michael Stoltz, on behalf of the Estate of J.P. Stoltz, deceased*

Address: *25 St. Andrews Drive*
Little Rock, AR 72212

Phone: Daytime *(501) 221-6341* Evening *(501) 221-9503*

Date: *February 18, 1993*

STATEMENT OF FACTS

1. Specify below the details of what the judge did that you think constitutes misconduct or indicates disability. (Please type or print legibly.)

This case involves my Father's Estate, and insurance proceeds that were wrongfully paid to my older brother, Steve. I am attaching a copy of all documents that have been filed by my attorneys after the Court's Opinion. These documents explain in detail the "legal" issues involved, and the facts to support my contention that Judge Holt is guilty of unethical conduct.

A Pulaski County Circuit Court jury decided that the insurance company had committed fraud by knowingly disregarding the advice of its attorneys, and not alerting the Estate to its potential claim by interpleading $2,000,000 of life insurance proceeds back in 1978 when my Father died so that the Estate could present a claim. The Friday Law Firm was a potential Defendant to those proceedings. My attorneys and I decided not to sue the Friday Law Firm if they would agree to sign a "Tolling Agreement" stating that they would not use the statute of limitations as a defense from the date of the agreement forward. We

decided we would pursue the case against the insurance company alone for the time being.

The Friday Firm had an interest in the ultimate outcome of these proceedings. It represented my brother, Steve, personally and as Executor of the Estate. This law firm also represented the insurance company that wrongfully paid the proceeds to Steve, and many other parties that had conflicts of interest. The Friday Firm had access to documents from the insurance company, and actually reviewed them, indicating the Estate was the rightful beneficiary to these insurance proceeds yet did not tell the Estate because that would have exposed its "other" client, First Pyramid Life, to a suit for paying the wrong person. The Friday Firm believes the Supreme Court's Opinion helps insulate them from a legal malpractice lawsuit. The Friday Firm would have been sued by the insurance company if the jury's verdict had been upheld, and would have been sued by Steve, who had signed an Indemnity Agreement when he received the money from the insurance company, had the jury verdict been upheld. During oral arguments before the Arkansas Supreme Court, Justice Corbin pointedly asked, "Why haven't you sued the Friday Law Firm. The pleadings from my attorneys explain the Friday Firm's exposure in detail.

Chief Justice Jack Holt, Jr. wrote an Opinion that overturned the jury verdict and dismissed our lawsuit. Shortly after the Supreme Court's Opinion, I heard that Jack Holt, Jr. had a very close personal relationship with members of the the Friday Law Firm, specifically Herschel Friday, and that these two individuals routinely went on hunting trips together. This seemed unethical to me, and I instructed my lawyers to investigate the matter and apprise me of my legal rights.

An investigation of this matter by my attorneys turned up the fact that Jack Holt, Jr. and Mr. Friday had indeed hunted together through the years, including the period of time when this case was

on Appeal to this Court. The Appeal was filed on September 10, 1991, and is not final yet.

We do not know all the facts concerning the extent of Judge Holt's relationship with Herschel Friday. We asked the Supreme Court to appoint a "Special Master" to investigate this matter if it refused to voluntarily disqualify itself. The Supreme Court issued a "Concurring Opinion" which I am enclosing denying our Motion and refusing to appoint a Special Master to uncover the facts concerning Judge Holt's relationship with Herschel Friday. We feel that the hunting excursions alone are enough to cause one to question Judge Holt's impartiality. We deem the Supreme Court's refusal to acknowledge the extent of the relationship between Judge Holt and Herschel Friday, and deny their hunting trips together, as appalling and as an admission of guilt.

I am asking the Arkansas Judicial Discipline & Disability Commission to investigate what I believe to be a serious ethical violation. Judge Jack Holt, Jr. should have stepped down like Judge Dudley did. I am also asking that the extent of the relationshp between Judge Holt and the Friday Law Firm be fully explored and the details spelled out for the public he serves. Judge Holt's involvement in these proceedings causes me, and my family, to question the fairness and impartiality of his Opinion, and indicates to me that the Supreme Court is more interested in political favors and social friendships than justice for the citizens of the State of Arkansas.

* * *

a) What is the name and number of the case?

Case name: *First Pyramid Life, et al. v. Stoltz*
Case No.: *92-4*

b) What kind of case is it? *civil*

c) What is your relationship to the case?
plaintiff/petitioner

d) If you were represented by an attorney in this matter at the time of the Judge's conduct, please identify the attorney:

Name: *Charles Phillip Boyd, Jr.*

Address: *Davidson Law Firm, Ltd.*
P.O. Box 1300
Little Rock, AR 72203

Phone: *(501) 374-9977*

e) Identify any other attorney(s) who represented you or any other person involved in the case:

Name: *Charles Darwin Davidson*

Address: *Davidson Law Firm, Ltd.*
P.O. Box 1300
Little Rock, AR 72203

Phone: *(501) 374-9977*

Represented: *J. Michael Stoltz, Appellee*

4. List documents you have attached that help support your allegation that the judge has engaged in misconduct or has a disability:

Arkansas Supreme Court's Opinion of December 21, 1992

Motion for Vacatur, To Disqualify And, In The Alternative, To Appoint A Special Master, And Motion For Extension Of Time To File Petition For Rehearing & Brief

Petition and Brief For Rehearing

Appellant's Brief In Reply To Motion For Vacatur, To Disqualify And In The Alternative, To Appoint A Special Master

Appellant's Response To Petition And Brief For Rehearing

Reply To Appellants' Brief In Reply To Motion For Vacatur, To Disqualify And, In The Alternative, To Appoint A Special Master, And Appellants' Response To Petition And Brief For Rehearing

Arkansas Supreme Court's Concurring Opinion of February 15, 1993

5. List documents that are not attached and should be obtained by the Commission that help support your allegation(s) and may aid in the Commission's investigation:

1) *Any log, or other documentation, listing people or guests who have been hunting on Mr. Friday's farm at Mayflower for the past 5 years;*

2) *Log records indicating when Mr. Friday, or someone from the Friday Law Firm, and Mr. Holt, have flown together;*

3) *Lease documents for all the leases Judge Holt and Mr. Friday have had in the State of Texas, or elsewhere during the past 5 years for hunting purposes;*

4) *Any records indicating trips by Mr. Friday and Judge Holt to Oaklawn in Hot Springs;*

5) *Any documentation evidencing Judge Holt's review of the record in these proceedings prior to, or after, he wrote his Opinion of December 21, 1992;*

6) *Any and all documentation indicating, or evidencing, the nature or extent of Judge Holt's relationship with the Friday Law Firm, including but not limited to Mr. Herschel Friday.*

* * *

EXHIBIT B

AFFIDAVIT

Comes the undersigned and does hereby solemnly state under oath the following facts and information are true and correct to the best of my knowledge and belief:

1. I am one of the attorneys representing the Estate in the matter styled First Pyramid Life Insurance Company Of America; USAble Insurance Company vs. J. Michael Stoltz, As Special Administrator of the Estate of J.P. Stoltz, Deceased, Ark. Supreme Court No. 92-4.

2. I filed a Motion For Vacatur, To Disqualify And, In The Alternative, To Appoint A Special Master in these proceedings.

3. The reason for the request that a Special Master be appointed if this Court would not voluntarily step down was so that the true facts underlying the number of times Chief Justice Holt has been a guest of Mr. Friday's on his private hunting farm outside of Mayflower, Arkansas, as well as other activities partaken by these individuals, could be fully discovered and made publicly known.

4. The Court rendered a decision on February 15, 1993 denying the Estate's request that it disqualify itself, and refusing to appoint a Special Master. The questions concerning Judge Holt's relationship with Mr. Friday were left unanswered.

5. Upon receipt of this Opinion, J. Michael Stoltz made the decision to file a Complaint with the Arkansas Judicial Discipline & Disability Commission. It is the undersigned's understanding that said Commission has the ability to ascertain the facts and information requested by the Estate in its pleadings filed before this Court.

6. It is the undersigned's sincere belief that this Court should not render a decision on the Petition for Rehearing, nor any further decisions on the merits of this matter pending the completion of the investigation by the Commission, and that it would severely damage the Estate's ability to seek a fair and impartial hearing before this Court should facts mandating a recusal be discovered by the Commission after this Court's Opinion has become final.

s/ Charles Phillip Boyd, Jr.
CHARLES PHILLIP BOYD, JR.

VERIFICATION

I, Charles Phillip Boyd, Jr., the undersigned, do hereby state under oath that the statements set forth hereinabove are true and correct to the best of my information, knowledge and belief.

s/ Charles Phillip Boyd, Jr.
Charles Phillip Boyd, Jr.

SUBSCRIBED AND SWORN TO before me a Notary Public, on this the 18th day of February, 1993.

s/ Edwina K. Bell
NOTARY PUBLIC

My Commission Expires;
12-1-95
CPB, jr: emk: 067B

s/ Charles Phillip Boyd, Jr.
CPB, JR.

ORDERS OF THE ARKANSAS SUPREME COURT DATED FEBRUARY 22, 1993

OFFICE OF THE CLERK
SUPREME COURT OF THE STATE OF ARKANSAS
ARKANSAS COURT OF APPEALS
JUSTICE BUILDING
625 MARSHALL STREET
LITTLE ROCK, AR 72201

February 22, 1993

Charles Phillip Boyd, Jr.
Attorney at Law
P.O. Box 1300
Little Rock, AR 72203-1300

Re: 92-4 First Pyramid Life Insurance Company of America v. J. Michael Stoltz, as Special Administrator of the Estate of J. P. Stoltz, Deceased

Dear Mr. Boyd:

The Supreme Court made the following orders in the above styled case today:

"Petition for Rehearing is denied.
Dudley, J., not participating."

"Appellee's motion for stay is denied.
Dudley, J., not participating."

"Appellee's motion for reconsideration of Motion for Vacatur, to Disqualify and, in the alternative, to Appoint a Special Master, is

denied. The appellee's initial motion (Motion for Vacatur) was denied by the court without written opinion. In his present motion, the appellee characterizes the concurring opinion filed by Chief Justice Holt as the court's opinion which is incorrect. The concurring opinion filed by Chief Justice Holt was his written concurrence with the court's denial of appellee's original motion.
Dudley, J., not participating."

Sincerely yours,

s/ Leslie W. Steen
Leslie W. Steen, Clerk

LWS:rh

cc: Peter G. Kumpe
& John E. Tull III
William C. Brazil
Vincent Foster, Jr.
& Michael Booker
Edgar J. Tyler
Robert Keller Jackson

MOTION FOR STAY OF MANDATE
FILED FEBRUARY 22, 1993

IN THE ARKANSAS SUPREME COURT

NO. 92-4

FIRST PYRAMID LIFE INSURANCE COMPANY OF AMERICA; USABLE INSURANCE COMPANY

APPELLANTS

VS.

J. MICHAEL STOLTZ, As Special Administrator of the Estate of J.P. Stoltz, Deceased

APPELLEE

MOTION FOR STAY OF MANDATE

COMES J. Michael Stoltz, as Special Administrator of the Estate of James Patrick Stoltz, deceased, and for his Motion does state as follows:

1. The Supreme Court announced in open court on February 22, 1993 that it was denying all Motions currently pending before the Court in these proceedings, including the Petition for Rehearing filed by the Appellee/Cross Appellant, J. Michael Stoltz.

2. In accordance with Rule 22 of the Rules of the Supreme Court, J. Michael Stoltz respectfully states that he intends to prosecute these proceedings to the Supreme Court of the United States. He also intends to investigate pursuing a cause of action in Federal Court, if same can be brought under the facts and the law as he believes same exist in the case at bar.

3. A $50.00 deposit has been placed with the Clerk of this Court for a copy of the record in these proceedings, and same is hereby ordered in accordance of Rule 22 (c) of the Rules of the Supreme Court.

4. J. Michael Stoltz pledges to expeditiously move forward in these proceedings so that the litigants in question not experience any undue delay.

5. The Appellee, J. Michael Stoltz, respectfully prays that the record of the lower court proceedings be properly lodged with the records' clerk of this Court so that same is not lost, misplaced, or disposed of during the aforementioned proceedings.

WHEREFORE, J. Michael Stoltz, as Special Administrator of the Estate of James Patrick Stoltz, respectfully prays that the mandate of this court be stayed pending further prosecution of these proceedings, including but limited to prosecution of same to the Supreme Court of the United States, that the record of the lower court proceedings in these proceedings be kept and preserved, and for all other relief to which is justifiably entitled.

Respectfully submitted,

DAVISON LAW FIRM, LTD.
P.O. Box 1300
Little Rock, AR 72203-1300
Telephone: (501) 374-9977

By: s/ Charles Phillip Boyd, Jr.
Charles Phillip Boyd, Jr.
Bar No. 82023

CERTIFICATE OF SERVICE

I, Charles Phillip Boyd, Jr., do hereby certify that the above and foregoing has been mailed by ordinary mail with sufficient postage affixed thereon, on this the 22nd day of February, 1993, to:

Peter G. Kumpe
Williams & Anderson
400 Rogers Building
111 Center Street
Little Rock, Arkansas 72201

s/ Charles Phillip Boyd, Jr.
Charles Phillip Boyd, Jr.

CPB:cwu:2075B

MOTION TO SUPPLEMENT RECORD FILED MARCH 12, 1993 WITH EXHIBITS

IN THE ARKANSAS SUPREME COURT

NO. 92-4

FIRST PYRAMID LIFE INSURANCE COMPANY OF AMERICA; USABLE INSURANCE COMPANY

APPELLANTS

VS.

J. MICHAEL STOLTZ, As Special Administrator of the Estate of J.P. Stoltz, Deceased

APPELLEE

MOTION TO SUPPLEMENT RECORD

Comes the Appellee, J. Michael Stoltz, as Special Administrator of the Estate of James Patrick Stoltz, deceased, and for his Motion does state as follows:

1. All pleadings previously filed before this Court are incorporated herein, by reference.

2. The basis for the Supreme Court's Opinion overturning the jury's findings of fact in these proceedings is, in essence, an allegation of what the record did not contain; i.e. evidence of fraud on the part of the Appellant and a concurrent tolling of the statute of limitations.

3. The Appellee's post-Opinion pleadings challenging the substantive merits of the Court's Opinion were geared towards

alerting the Court to specific and unequivocable evidence of fraud in the record, and testimony/documentation from which fraud can be properly inferred, and a jury instruction which states in plain English that if the Estate was the proper beneficiary (as the jury found), then the Appellant was guilty of fraud and the statute of limitations was tolled. The Court granted a Motion made by the Appellee specifically requesting an enlargement of the page limit prescribed by the Rules in order to point out this information in the voluminous record. The task was painstaking and arduous and, when completed would allow any reader to pinpoint substantial evidence of fraud quickly and efficiently.

4. The Records Clerk of the Arkansas Supreme Court apprised counsel for the Appellee in passing that the record in these proceedings had not been checked out by any Justice of this Court subsequent to the Court's Opinion which was delivered on December 21, 1992. The fact that a "log" record of such matters was kept was inadvertently discovered by the Appellee after the Petition for Rehearing was denied by this Court. Attached hereto as Exhs. A and B are Affidavits from Appellee's counsel, and his secretary, in support of this Motion.

5. The Records Clerk originally agreed to sign an Affidavit verifying these facts, but has since either declined, or chosen for other reasons not to sign said Affidavit. The bottom line is no Affidavit is forthcoming, thus leaving the Appellee no alternative method of ensuring these facts are of record in these proceedings.

6. The Appellee is pursuing avenues of further Appellate Court review based on a denial of due process, or additional legal proceedings. Appellee's counsel does not want to appear unduly adversarial with this Court when same would serve no useful purpose. He simply feels this is a fact that needs to be in the record should a higher Court review same.

WHEREFORE, the Appellee respectfully prays that the record in these proceedings be supplemented, and for all other relief to which he is justifiably entitled.

Respectfully submitted,

DAVIDSON LAW FIRM, LTD.
P.O. Box 1300
Little Rock, Arkansas 72203-1300
Telephone: (501) 374-9977

By: s/ Charles Phillip Boyd, Jr.
Charles Phillip Boyd, Jr.
Bar No. 82023

CERTIFICATE OF SERVICE

I, Charles Phillip Boyd, Jr., do hereby certify that the above and foregoing has been mailed by ordinary mail with sufficient postage, affixed thereon, on this 11th day of March, 1993, to:

Peter G. Kumpe
Williams & Anderson
400 Rogers Building
111 Center Street
Little Rock, AR 72201

s/ Charles Phillip Boyd, Jr.
Charles Phillip Boyd, Jr.

CPBjr:emk:2167B

EXHIBIT A

AFFIDAVIT

Comes the undersigned and does hereby solemnly state under oath the following facts and information are true and correct to the best of my knowledge and belief:

1. I am one of the attorneys for the appellee in the case of *Stoltz v. First Pyramid Life, et al.*, Arkansas Supreme Court No. 92-4.

2. Ms. Jeanne Matthews, the "Records Clerk" for the Arkansas Supreme Court, apprised me in passing that she has a log of *anyone* who checks out the record of any case after the Supreme Court has rendered its decision/Opinion on any matter.

3. She apprised me that no Justice of the Arkansas Supreme Court, nor anyone in their behalf, has checked out the record in these proceedings since the Court's Opinion of December 21, 1992.

4. Ms. Matthews originally agreed to sign an Affidavit to this effect. She subsequently indicated that this issue would need to be cleared with the Clerk of the Court, and that she would sign same if permission from him was granted. At all points in time, Ms. Matthews was told that she was under no obligation to the undersigned, or his clients, to sign same.

5. Ms. Matthews apprised me, in the presence of my secretary, that the Affidavit attached hereto as Exh. 1 is true and accurate, but that she had decided not to sign same without the approval of the Clerk of the Court and/or the Court.

6. The Clerk of this Court has apprised me that no Affidavit would be signed by Ms. Matthews.

s/ Charles Phillip Boyd, Jr.
Charles Phillip Boyd, Jr.

VERIFICATION

I, Charles Phillip Boyd, Jr., the undersigned, do hereby state under oath that the statements set forth hereinabove are true and correct to the best of my information, knowledge and belief.

s/ Charles Phillip Boyd, Jr.
Charles Phillip Boyd, Jr.

SUBSCRIBED AND SWORN TO before me a Notary Public, on this the 11th day of March, 1993.

s/ Cindy MacCallih
NOTARY PUBLIC

My Commission Expires:
12-1-95
CPB, jr.: emk: 2168B
exhibit b

EXHIBIT 1

AFFIDAVIT

Comes the undersigned and does hereby solemnly state under oath the following facts and information are true and correct to the best of my knowledge and belief:

1. My name is Jeanne Matthews. I am the Records Supervisor for the Arkansas Supreme Court.

2. I am familiar with the case of *First Pyramid Life, et al. v. Stoltz,* 92-4. If this matter had been checked out to one of the Arkansas Supreme Court Judges after the decision came down on December 21, 1992, I would have a "log record" of same. Upon checking my records, I see that this record was never checked out to any Supreme Court Justice of the Arkansas Supreme Court after the decision came down on December 21, 1992.

_____

VERIFICATION

I, _____, the undersigned, do hereby state under oath that the statements set forth hereinabove are true and correct to the best of my information, knowledge and belief.

_____

SUBSCRIBED AND SWORN TO before me a Notary Public, on this the __ day of _____, 1993.

_____
NOTARY PUBLIC

My Commission Expires:

_____

CPB, jr.: emk:2090B

EXHIBIT B

AFFIDAVIT

Comes the undersigned and does hereby solemnly state under oath the following facts and information are true and correct to the best of my knowledge and belief:

1. I am the legal secretary and legal assistant to Charles Phillip Boyd, Jr., one of the attorneys for the Appellee in the case of *Stoltz v. First Pyramid Life, et al.*, Arkansas Supreme Court No. 92-4.

2. I traveled with Mr. Boyd to the office of the Records Clerk of the Arkansas Supreme Court, Ms. Jeanne Matthews, during the latter part of February, 1993.

3. Ms. Matthews told myself and Mr. Boyd that the Affidavit prepared for her, and attached to Mr. Boyd's Affidavit as Exh. 1 was true and correct, but that she had decided to seek the permission of the Clerk of the Court, or the Court itself, prior to signing same.

4. Mr. Boyd at all times apprised Ms. Matthews that she was under no obligation to sign the Affidavit in question, and that he was not, and would not, request that she sign any document that did not document the unmitigated truth.

s/ Edwina M. Keith
Edwina M. Keith

VERIFICATION

I, Edwina M. Keith, the undersigned, do hereby state under oath that the statements set forth hereinabove are true and correct to the best of my information, knowledge and belief.

s/ Edwina M. Keith
Edwina M. Keith

SUBSCRIBED AND SWORN TO before me a Notary Public, on this the 11th day of March, 1993.

s/ Cindy Marie Callih
NOTARY PUBLIC

My Commission Expires:
12-1-95
CPB, jr.: emk:2169B

LAW OR CHANCERY MANDATE

STATE OF ARKANSAS)
In the Supreme Court) SCT.

BE IT REMEMBERED, That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court Room in the City of Little Rock, on the 5th day, being the first Monday of October, A.D. 1992, amongst others were the following proceedings, to-wit:

On the 15th day of March, A.D. 1993, a day of said term

No. 92-4

FIRST PYRAMID LIFE INSURANCE CO. OF AMERICA

APPELLANT

vs.

J. MICHAEL STOLTZ, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF J.P. STOLTZ, DECEASED

APPELLEE

Appeal from Pulaski Circuit Court Second Div. District
(Circuit Court Case No. 89-2464)

Appellee's motion for stay of mandate is denied.

Holt, C.J. and Dudley, J., not participating.

[stamped]
IN TESTIMONY, That the above is a true copy of the order of said Supreme Court, rendered in the case herein stated, I, Leslie W. Steen, Clerk of said Supreme Court, hereunto set my hand and affix the seal of said Supreme Court, at my office in the city of Little Rock, this 15th day of March, A.D. 1993

s/ Leslie W. Green
CLERK

MANDATE
REVERSED LAW

STATE OF ARKANSAS,

In the Supreme Court

BE IT REMEMERED, That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court Room in the City of Little Rock, on the 5th day, being the first Monday of October, A.D. 1992, amongst others were the following proceedings: on the 21st day of December, A.D. 1992, a day of said term:

92-4

FIRST PYRAMID LIFE INSURANCE COMPANY OF AMERICA

APPELLANT

V.

J. MICHAEL STOLTZ, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF J. P. STOLTZ, DECEASED

APPELLEE

Appeal from Pulaski Circuit - 89-2464

This cause came on to be heard upon the transcript of the record of the Circuit Court of Pulaski County, and was argued by the counsel; on consideration whereof it is the opinion of the Court that there is error in the proceedings and judgment of said Circuit Court in this cause as set out in the opinion wherein delivered.

It is therefore considered by the Court that the judgment of said Circuit Court in this cause rendered be, and the same is hereby, Reversed on Appeal; Affirmed on Cross Appeal with costs in accordance with the opinion herein delivered.

It is further considered that said appellant recover of said appellee all its costs in this Court in this cause expended, and have execution thereof.

Dudley, J., not participating.

COSTS ON APPEAL

Appellant's brief	$500.00
Filing fee	$100.00
Record	$5,366.97

IN TESTIMONY, that the above is a true copy of the judgment of said Supreme Court in the case therein stated. I, Leslie W. Steen, Clerk of said Supreme Court, hereto set my hand and affix the seal said Court, at my office in the City of Little Rock, this 15th day of March, A.D. 1993.

s/ Leslie W. Steen
Clerk

ORDER OF THE ARKANSAS SUPREME COURT
DATED APRIL 6, 1993

Office of the Clerk
Supreme Court of the State of Arkansas
Arkansas Court of Appeals
Justice Building
625 Marshall Street
Little Rock, AR 72201

April 5, 1993

Charles Phillip Boyd, Jr.
Attorney at Law
P.O. Box 1300
Little Rock, AR 72203-1300

Re: 92-4 First Pyramid Life Insurance Company of America v. J. Michael Stoltz, as Special Administrator of the Estate of J.P. Stoltz, Deceased

Dear Mr. Boyd:

The Supreme Court made the following order in the above styled case today:

> "Appellee's motion to supplement the record is denied. See per curiam this date. Holt, C.J., and Dudley, J., not participating."

Sincerely yours,

s/ Leslie W. Steen
Leslie W. Steen, Clerk

LWS:rh
Enclosure
cc: Peter G. Kumpe
William C. Brazil
Robert Keller Jackson
Edgar J. Tyler
Vincent Foster, Jr.
& Michael Booker

ORDER OF THE SUPREME COURT OF THE UNITED STATES DATED MAY 20, 1993

Supreme Court of the United States
No. A-873

J. Michael Stoltz,

Petitioner

v.

First Pyramid Life Insurance Company, et al.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including July 22, 1993.

s/ Harry A. Blackmun
Associate Justice of the Supreme
Court of the United States

Dated this 20th
day of May, 1993.

SUPPLEMENTAL ABSTRACT OF RECORD (ATTACHED AS EXHIBIT A TO BRIEF IN SUPPORT OF *MOTION FOR VACATUR, ET AL.* AND FILED WITH ARKANSAS SUPREME COURT)

WITNESSES' TESTIMONY

Merl Scheffey: The Estate was the contractually designated beneficiary. (R.3690)

Charles Boling: I worked for First Pyramid Life from 1974 until it was sold in 1984, and am familiar with the Flex 79 Trust product. (R.3792-93) An insurance company has the obligation to contact an entity if that entity has no knowledge of a claim to insurance proceeds. It is a responsilibity "*recognized in the industry.*" (R.3833)

Mike Rainwater: I am a practicing attorney in Little Rock and was engaged in September, 1987 to represent certain members of the Stoltz family with regard to a probate proceeding in Faulkner County. I came across the documents indicating the Estate was the proper beneficiary *on August 8, 1988* when we received the Estate filed *under Court Order. We had propounded discovery to the Friday Firm seeking these files, and the Court ultimately ordered production of same.* (R.3864-65) The members of the family I represented were told about the Estate's claim that afternoon and could not believe it. One started crying. (R.3867) *The documents naming the Estate as the beneficiary were in the hands of the Friday Law Firm, who represented Steve Stoltz.* (R.3873) I had been working with my clients for almost a year, and we had no idea the insurance belonged to the Estate. These documents were a complete surprise. (R.3874-75) My clients had no indication the Estate had a claim to these proceeds prior to August 8, 1988, when the Estate files and an October 5, 1977 Balance Sheet were produced. (R.3876)

William Webster: I have 33 years of corporate trust work, and 5 years experience as a Trust consultant. I'm past chairman of the Trust section for the Arkansas Bankers Association, and for 3 years was on the Committee of the Trust Division of the Arkansas Bankers Association. (R.3880-81) *The Friday firm represented people/entities with conflicting and adverse interests that could not be properly represented by one law firm, i.e. Steve Stoltz, individually and as Executor, First National Bank as Trustee of Residuary Trust which would have received the proceeds had the Estate been paid, and First National Bank as the largest creditor of the Estate.* (R.3891/3907) The First National Bank should have been apprised of the Estate's claim to the insurance proceeds and was not. (R.3889-90, 3904-05) *The Executor's, and the attorney's for the Estate, responsibilities to the heirs and beneficiaries of the Estate is not fulfilled by maintaining contact with the beneficiaries themselves, or obtaining their acquiescence.* The First National Bank should have been informed because they are skilled fiduciaries with the requisite knowledge and experience to defend the position and the property rights of the beneficiary of *the* Trust. (R.3895) The information in the June 27, 1983 letter from *James Saxton to Steve Stoltz*, apprising him the Estate had a potential claim to the insurance proceeds, was *never imparted to the First National Bank*, the Trustee for the heirs of the Estate. (R.3943)

Robert Grant: I am a Trust officer at First Commercial Trust Company and have been there for 26 years. (R.3945) *The Friday Firm represented the Estate and the Estate's largest creditor, First National Bank. Herschel Friday was on the board of First National Bank as was Herbert Thomas, the majority stockholder of First Pyramid Life (FPL).* (R.3947-48) We would have accepted the appointment of Trustee in 1978, had we been apprised of the Will and the Trust. (R.3949) We were never given the pertinent documents listing the potential assets of the Estate. We never signed a Waiver of Accounting waiving our right to see accountings dealing with assets of the Estate. I saw the two memos

from Allan Horne and John Peace, and the June 27, 1983 letter from James Saxton to Steve Stoltz telling the Estate of its potential claim, for the first time at my deposition on January 31, 1990. I have never seen the insurance policy. If we had known this, we would have made a claim for the money. (R.3950-53) *At no point in time were we ever apprised by anyone that the Estate had a potential claim to these proceeds, or that there was any controversy concerning the proper beneficiary.* (R.3949, 3959-60)

Ron Mason: I worked for First Pyramid from October of 1974 to October, 1979 and am familiar with the Flex 79 product. (R.4006-07) There was a controversy at First Pyramid Life regarding the proper beneficiary under the policy after the death of J.P. Stoltz. The memos from Allan Horne and John Peace describing the controversy are dated the same day as the meeting where FPL decided to pay Steve. (R.4081-82) In an interpleader action, everybody with a claim is alerted and comes forward. *First Pyramid Life was told by Allan Horn that interpleading the money was the safest course, but that the insurance company would be opening itself up to a suit by the loser.* (R.4083-84) The memo from Allan Horne indicates there is a "substantial risk" to FPL regardless of who is paid, and is dated the same day this "consensus" on whom to pay was allegedly reached. (R.4084)

Elizabeth Oswald: I worked for FPL from 1956 until 1987. (R.4087) I know what an interpleader is from my work in the insurance industry. I would have expected First Pyramid Life to follow the advice of their attorneys and interplead the money. It would surprise me if they didn't. I never saw Allan Horne's memo prior to my recent deposition. (R.4125-27) I cannot explain Plaintiff's Exh. 26, which is a blank Change of Beneficiary form, dated March 22, 1976, which contains my signature and that of Gene Chadwick, but not that of James Patrick Stoltz. (R.4128)

John Copeland: I am a lawyer and teach law at the University of

Arkansas at Fayetteville. (R.4223) An insurance company has a contractual obligation to pay the proper beneficiary. The obligation does not expire until the proper beneficiary is in fact paid, even if same occurs 15 years down the road. (R.4284-85)

Jim Duran: I worked for First Pyramid for 17 years, and was supervisor of claims when this policy was paid. (R.4319) I have identified the policies in question as exhibits for the jury as if a Rider changing the beneficiary from the Estate to the son was included when the policy was presented for payment, when in fact no Change of Beneficiary Rider was found with the policies at the time of J.P. Stoltz' death. (R.4334) A new policy was issued in August, 1976, showing the Estate as the beneficiary, as per Allan Horne's memo. I have not shown this policy to the jury because I don't have it. (R.4339) An insurance company does not fulfill its contractual obligations until it pays the contractually designated beneficiary. (R.4349) *The meeting where we decided to pay Steve Stoltz occurred on January 18, 1978, the same date as the Allan Horne and John Peace memos noting the discrepancy in the proper beneficiary, and the same day as Defendant's Exh. 20, the handwritten summary of the meeting written by John Shields.* (R.4342, 4353) First Pyramid Life's actions may have been different had the Estate made a claim to the proceeds in 1978. The interpleader action recommended by Allan Horne would have alerted the Estate to its claim. Nobody but the son was ever told by First Pyramid Life they had a potential claim to the proceeds. *The Estate had no way of knowing they had a right to make a claim to the proceeds because we did not tell them. An interpleader action would have alerted the Estate to its claim, but it would also have exposed the company to a suit.* (R.4354-55) We had someone sign an indemnity agreement when we knew someone else had a potential claim to the money in order to reduce any future exposure we may have. (R.4358-62) There is no indication Steve Stoltz, age 25, was told about the memos from our lawyers outlining the potential controversy when we had him sign an indemnity

agreement representing no one else had a claim to the proceeds and paid him the money. (R.4362-63)

Paul Dixon: I was employed back in 1975 and 1976 by Diversified Financial Services, an agency which sold insurance. (R.4378). I have no idea how the alleged Change of Beneficiary forms were allegedly signed March 1, 1976, when they were mailed by me in blank to the insured on March 5, 1976. (R.4401) *The Friday Firm represented the agency I worked for when this claim was processed.* (R.4401-2) *The insurance company never told me they had received memos from their attorneys outlining any controversy regarding the proper beneficiary.* (R.4412) *As the agent who processed this claim, I would have told Steve Stoltz had I known of the memos from Allan Horne and John Peace documenting the discrepancy in the proper beneficiary because that's the only honest thing to do.* (R.4413) I sold a $3,000,000.00 First Pyramid Flex 79 policy to Steve Stoltz five (5) days after he received the $2,000,000.00 life insurance proceeds. (R.4413-14) It appears as though I also sold Guy Boyett and Bruce Sossaman $300,000.00 First Pyramid Flex 79 policies each a short time after Steve Stoltz was paid these insurance proceeds. (R.4414-15)

Bruce Sossaman: I have worked at Polyvend for 21 years. (R.4431) *The Friday Law Firm represented Polyvend when the insurance policy was taken out and paid, and continued to represent Polyvend and Steve Stoltz after Pat Stoltz' death.* (R.4453)

Guy Boyett: I worked for Pat Stoltz at Polyvend when these life insurance policies were purchased. (R.4456) I never told any members of the Estate, or any other brothers and sisters, about their potential claim to the insurance proceeds. (R.4470)

Allan "Dick" Horne: I am associated with FPL as an attorney and witness. I am not a disinterested party. (R.4523-24) The Policy

Provisions should control the beneficiary. An insurance company has a contractual obligation to pay the designated beneficiary. (R.4524-25) *The insurance company recognized that the Estate had a potential claim.* (R.4528) *I told FPL there was a substantial risk whether the proceeds were paid to the son or the Estate. If the money was interplead, I alerted FPL to the fact that it could be exposed to a suit by the loser.* (R.4540-41) *I would have told Steve Stoltz the substance of the memos, and the discrepancy concerning the proper beneficiary, had I thought he was not informed of same. I would have told him about the whole matter, and the whole picture, had I thought he was not informed.* (R.4543-44) I have no knowledge the Estate knew about, or was informed of, its potential claim. I brought the Estate's potential claim to FPL's attention and told them that an interpleader was the safest alternative. This action would have alerted the Estate to its potential claim. I had FPL require an indemnity agreement when they paid Steve Stoltz in case they paid the wrong person. (R.4544-45). *I advised FPL of the adverse interests of the son and the Estate, and the fact that the Trustee of the Residuary Trust may seek further inquiry if there was a chance the policy funds may pass to such trust, especially if no other assets passed to such trust.* I heard Robert Grant of First National Bank testify that First National Bank was never informed of the Estate's potential claim, and have no knowledge the Trustee of said trust was advised of the Estate's potential claim. (R.4548-49).

Mike Stoltz: I first became aware of the October 5, 1977 financial statement, and that the Estate had a claim, on August 8, 1988. I was in shock. We felt we have been lied to. I thought the money had been left to Steve to pay estate debts. (R.4593-96) The Estate has remained open since 1978 and has not closed as of today. (R.4603) *We had to have a Court Order to get the documents on August 8, 1988 showing the Estate was the beneficiary of the life insurance policies.* (R.4613).

Lewis Mathis: NOTE: *Plaintiff wanted to go into the Tolling Agreement executed by the Friday Firm, tolling the statute of limitations as to the Friday Firm until the suit against First Pyramid Life was concluded. The Trial Court disallowed same.* (R.4611-12, 3531-35, 4676-80).

I was a lawyer with the Friday Law Firm from 1972 until 1990. I began working for J.P. Stoltz and Polyvend in 1972 and continued through 1980-81. (R.4627-28) *I have never seen the insurance company files, or the memos from Allan Horne and John Peace.* (R.4645) *As the attorney for the Estate, I only had a fiduciary relationship with the Executor, not the other beneficiaries.* (R.4649) If Steve Stoltz had not paid estate debts, including the large debt owed to First National Bank which had Polyvend stock pledged as collateral, he would have been forced to sell Polyvend, instead of keeping it all to himself, and share the proceeds received from said sale with his brothers and sisters. (R.4653-54) *There is a tax write up document from the IRS files, written by the IRS investigator, that says "... although the proceeds were paid to Steve Stoltz, there was and still is a question as to whether he was in fact the proper beneficiary."* (R.4656-57) (See also Plaintiff's Exh. 35) *The Friday Firm whited out portions of the Estate files before turning them over to the IRS.* (R.4658) The other children and beneficiaries had no individual counsel. (R.4666)

James Saxton: I am an attorney with the Friday Law Firm and have done work for the Estate of J.P. Stoltz. (R.4681-2) *None of the other beneficiaries were ever contacted by me.* I had no doubt James Stephen Stoltz was the beneficiary. (R.4692) *During the Estate tax litigation, files were altered (whited out) and then sent to IRS.* (R.4706) The IRS prepared a RAR which indicated the estate may be the proper beneficiary. (R.4706-07) Mr. Horne was concerned about FPL's potential liability to the estate. (R.4709) *The fear of being sued can motivate people to do certain things.* (R.4710) The IRS was attempting to receive information from

FPL. I knew the IRS did not have the Ron Mason memo of 8-9-76 indicating that any transfer of ownership without the Flex 79 Trustee's signature was ineffective, and conveyed this to Steve Stoltz. *I was representing the Estate and Steve Stoltz personally.* I was trying to convince the IRS Steve Stoltz was the beneficiary. I do not know if the Estate wanted me representing their interests under these circumstances. (R.4712-14). *The Friday Firm has been placed on notice that a potential claim for legal malpractice exists against it for mismanaging the Estate and not properly informing the Estate that it had a claim to these proceeds.* (R.4724-25) *I refused to talk to Mike Stoltz.* (R.4726).

Steve Stoltz: I had to assume a $1.62 million debt to First National Bank when my father died. Polyvend stock was pledged as collateral for this debt and Polyvend was left to me to run in my Father's Will. (See Defendant's Exh. 149, the Last Will and Testament of J.P. Stoltz) (R.4756) *I was never told by FPL about the memos from Allan Horne or John Peace indicating there was an issue concerning the proper beneficiary when they had me sign an indemnity agreement. If I had known there was an issue, I would have acted differently.* (R.4773-74) I understood if I had to sell Polyvend, the proceeds would be split between me and my brothers and sisters. (R.4779) My Dad never intended for the Estate to turn out the way it did, and for my brothers and sisters and other relatives not get anything through the Residuary Estate. (R.4795-97) *I never told the Estate about the June 7, 1983 letter from James Saxton telling me of the Estate's potential claim because James Saxton called and said forget it.* (R.4799) *Everything I did was upon the advice of the Friday Law Firm.* (R.4800-01) *Within six days of receiving the $2 million I purchased $3 million of life insurance from FPL.* (R.4804-05) See Plaintiff's Exh. 30.

Rita Fields: I did not know until 1988 that Steve, and not the Estate, had been paid the life insurance proceeds.

John Smith: I found out on August 8, 1988 that the money had been paid to Steve and not the Estate (R.4859)

EXCERPTS FROM EXHIBITS — STOLTZ

Allan Horne's Memorandum dated 1-18-78, found in Plaintiff's Exh. 1, at GL I-231. Four variations are discussed wherein the son (Steve) would be the beneficiary, with this quote discussing same:

> It should be noted that none seem fully satisfactory from a contract law standpoint since certain terms of the contract must be ignored, proper signatures were not obtained, or required by the company, certain changes must be allowed "ab initio" which is of questionable validity, especially in the absence of a clear intent, etc.

Several variations wherein the Estate is the beneficiary were discussed and noted. The Memo next contains this quote:

> *The Estate and the son do have adverse interests in this case.* Though the son is Executor of Mr. Stoltz' Will, the Will leaves the residue of the Estate to First National Bank in Little Rock as Trustee of a Trust for about 15 different parties. If anyone had the understanding these policy funds would pass to such Trust, particularly if no other significant assets passed to the Trust, *further inquiry may be forthcoming from the Trustee* or beneficiaries of the Trust.
>
> *The advantage of interpleader* or reformation actions is that contract actions by other parties

should be cut off. However, *this may have no affect on negligence actions and would alert all parties to the problem . . .*

If payment was made to the son, an Indemnity Agreement from him could reduce exposure. The Indemnity Agreement would be broadly drawn. *Exposure to a negligent suit by the Estate if the intent of the insured was found to be to leave the proceeds of the policy to the Estate and Trust established in the Will would still exist.*

Summary: *There is substantial risk whether payment is made to the son or the Estate . . .*

An interpleader action is probably the safest course. However, the company could be exposed to a suit from the loser, i.e. the son or the Estate. Therefore, this alternative is not a complete solution either.

Memorandum from John B. Peace to Allan W. Horne, found in Plaintiff's Exh. 1 at GLI-235.

Page 1:

Some evidence points to the fact that the insured's Estate is the beneficiary *(the policy itself appears to name the Estate), . . .*

Page 3:

It appears to me that an interpleader action might be an *invitation to the heirs of the Estate*

to come in and fight for determination that the Estate is the beneficiary.

Page 4:

I believe that either a suit for reformation or an interpleader action would be an appropriate step for First Pyramid to take under the above circumstances.

If First Pyramid makes payment to the son, and a Court later found that the decedent intended the Estate to be the beneficiary, I believe the Estate could show that *it had been damaged by the face amount of the policy which it did not receive.*

Indemnity Agreement signed by Steve Stoltz, found in Plaintiff's Exh. 1 at GL1-239.

The beneficiary (Steve Stoltz) does hereby represent and warrant to Pyramid that no other person, organization or entity has any right, claim or interest in the policies or against Pyramid or against any of its officers, directions or employees concerning its action, representations, or processing of the policies, or payment of the proceeds of the policies to the beneficiary. The beneficiary does hereby agree to indemnify Pyramid and hold it harmless from any loss of any kind or nature suffered by Pyramid as a result, consequence or occasion where the actions, representations or processing of the policies, or the payment of the proceeds of the policies to the beneficiary.

The insured's company's file contains a memorandum found in Plaintiff's Exh. 1 and GL1-84 documenting a meeting that occurred on November 5, 1979 between various individuals at First Pyramid Life and Trip Lazalere of the Friday, Eldridge & Clark law firm, which represented First Pyramid Life from 1978 up to and through the time it was sold, discussing the various tax ramifications involved in this matter. See also the Affidavit of Glen Cary, an employee of First Pyramid Life from June of 1979 until January of 1984, indicating that William H. Sutton of the Friday Law Firm was elected to the Board of First Pyramid in June of 1979, and that the Friday Law Firm had been providing legal advice to First Pyramid prior to June of 1979, and through the years provided extensive legal advice to First Pyramid. (R. 744) The Friday Firm does not deny, and candidly admitted to the Trial Court, that it represented First Pyramid Life itself, along with every other interested party, during the time when the statute of limitations would have run, i.e. 5 years, and there been no fraudulent concealment, and in particular in June of 1983 when Jim Saxton of the Friday Firm reviewed the insured's company's file and wrote Steve Stoltz a letter indicating the Estate may have a potential claim. (R. 3335-3367)

Defendant's Exh. 20: *1-18-78* Memo by John Shields of First Pyramid Life allegedly documenting meeting between Allan Horne, Jack Hewitt, Jim Duran and John Shields, *which is same day of Memos from Allan Horne and John Peace* noting discrepancies as to the proper beneficiary.

> Our contention is the son is the beneficiary and should receive the proceeds. *He is the only one to make a claim for the proceeds.*
>
> Allan Horne outlined 3 alternatives . . . 3) File an interpleader (this could instigate a negligence suit).

Defendant's Exh. 129: Instruction sheet for policy change for policy no. 141979F:

> Type new policy — show ownership as Flex 79 Trustee. Transfer of ownership dated 3/1/76 shall be removed from policy. Dated August of 1976.

Plaintiff's Exh. 35: RAR from IRS Agent Chapman to James Saxton of the Friday Law Firm:

> During the examination of the claim, the Estate was again requested to provide data on the policy. The request was for access to the *company* records regarding the application issue (including reinsurance) and possible transfer of ownership of the policy, plus any endorsements, changes of beneficiary applications, etc. The information was provided, but in at least two places the file had been altered to prevent the review of information by the Internal Revenue Service. You (through your attorney) refused to disclose the data found in those places. . . .
>
> It should be noted that the Estate did not establish that the decedent's Estate was not the beneficiary, (although the proceeds were paid to J. Stephen Stoltz, there was and is a question as to whether he was in fact the proper beneficiary.

Plaintiff's Exh. 3 — Memo of 8-9-76 from Ron Mason of First Pyramid Life to Paul Dixon, the agent who sold the policy:

> A recent reassessment of the administrative procedures under our Flex 79 Program has led us to request that any policies which bear an assignment or change of ownership be returned to us. We consider that such assignments or change of ownerships are ineffective without the Trustee's countersignature.
>
> If Mr. Stolz (sic) requires that the ownership of his policy be changed, please have him return the policy together with a new "Change of Ownership" form signed. Otherwise, please have him return the policy so that the previous change of ownership can be removed.

Defendant's Exh. 145: Letter from James Saxton to Steve Stoltz:

> Mr. Chapman's (IRS examiner) documents did not include the memorandum from Ron Mason to Paul Dixon of August 9, 1976, which indicated that it was First Pyramid's belief that the assignment as originally executed was not effective . . .
>
> At this point it appears that our first hurdle will be to prove to the Internal Revenue Service that in fact the policy was duly and validly assigned by your father to you. In the event that we convince Mr. Chapman, we'll then have to convince him that the assignment was made "in contemplation of death".

JURY INSTRUCTION CO-AUTHORED BY PARTIES' RESPECTIVE COUNSEL AND GIVEN WITHOUT OBJECTION (ATTACHED AS EXHIBIT B TO BRIEF IN SUPPORT OF *MOTION FOR VACATUR*, AND FILED WITH ARKANSAS SUPREME COURT)

JURY INSTRUCTION NO. 8

The plaintiff on behalf of the estate of James Patrick Stoltz, deceased, specifically alleges as a defense to USAble and First Pyramid's defense of limitations that the defendant fraudulently concealed information from the estate which would have allowed him to bring this cause of action at an earlier date. With respect to plaintiffs' allegation, you are instructed that mere ignorance of one's rights does not prevent the operation of the statute of limitations, but where the ignorance is produced by affirmative and fraudulent acts of concealment, the statute of limitations does not begin to run until the fraud is discovered. If there is some positive act of fraud which would conceal a person's cause of action, then the statute is tolled. You are further instructed that silence on the part of one who has a duty to speak constitutes fraudulent concealment and actionable fraud and will toll the statute of limitations. In this case whether or not there was a duty to speak depends on whether or not the estate was the legal beneficiary.

FILED
AUG 25 1993
OFFICE OF THE CLERK

No. 93-128

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

J. MICHAEL STOLTZ, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF J.P. STOLTZ, DECEASED,

Petitioner,

v.

FIRST PYRAMID LIFE INSURANCE COMPANY OF AMERICA, *et al.*,

Respondent.

On Petition For A Writ Of Certiorari To The Arkansas Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner represents certain disgruntled family members who sued an insurance company for breach of contract because it paid $2,000,000 in life insurance proceeds to their brother rather than the estate. Payment was made January 19, 1978, and their action was filed on April 20, 1989, more than 11 years after payment. A jury returned a verdict for $2,000,000 in compensatory damages plus $l,000,000 in punitive damages, but the Arkansas Supreme Court unanimously reversed the case on the ground that it was barred by the statute of limitations. Following the reversal, petitioner claimed that the Chief Justice of the Arkansas Supreme Court (and the author of the opinion) was biased because he had gone quail hunting with Herschel Friday of the Friday, Eldredge & Clark law firm ("Friday Firm"). Petitioner claimed the Friday Firm had an interest in the outcome even though they were not a party to the lawsuit. In this context, the petitioner raises the following questions:

1. Whether petitioner's due process rights were violated because the Chief Justice of the Arkansas Supreme Court purportedly went quail hunting with a member of a law firm whose lawyers were witnesses in the law suit.

2. Whether petitioner's due process rights were violated because the Arkansas Supreme Court noted that two family members represented by petitioner had also received notice that the estate of J.P. Stoltz was initially named as beneficiary of his life insurance policies.

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STATEMENT OF THE CASE

A. Introduction

The Arkansas Supreme Court in a unanimous decision reversed a jury award in favor of petitioner because the lawsuit was filed more than 11 years after the act in question and the statute of limitations had run. The Arkansas Supreme Court also noted that the record was devoid of any evidence of fraudulent concealment necessary to toll the running of the statute of limitations. Following the reversal, petitioner asserted for the first time that a "reliable source" had informed him that the Chief Justice of the Arkansas Supreme Court and Herschel Friday had gone quail hunting together on several occasions. Subsequently, "petitioner instructed his attorneys to investigate" the matter and in short shrift a motion for rehearing and vacatur was presented to the Arkansas Supreme Court. Both were denied.

Even were the underlying facts true, the issues presented are not novel and there is no reason for this court to grant certiorari. The first and second questions presented by the petition are the same and do not need to be considered separately.

B. Proceedings Below

On December 18, 1975, J.P. Stoltz applied to First Pyramid for life insurance totalling $2,000,000. The application designated the proposed insured's estate as beneficiary. Later, for tax reasons the application was revised to seek two policies: one in the amount of $50,000 and another for $1,950,000. After the applications were accepted, J.P. Stoltz completed and delivered to First Pyramid beneficiary agreements naming his oldest son, Steve Stoltz, as beneficiary.

That change was accepted in writing by First Pyramid without the countersignature on behalf of the Oklahoma trustee that acted as "legal" owner of the policy. To generate greater tax savings, First Pyramid designated these policies to be issued in Oklahoma because that State's law authorized higher group policy limits than did Arkansas law. J.P. Stoltz also completed and delivered a change of ownership form to First Pyramid naming his son owner of the larger ($1,950,000) policy to avoid paying estate tax on the policy proceeds.

J.P. Stoltz died on December 18, 1977. Only his son Steve Stoltz claimed the policy proceeds. Before paying the claim, First Pyramid sought the advice of its attorney, Allan W. ("Dick") Horne. Mr. Horne concluded in a memorandum ("Horne memorandum") that Steve Stoltz was the legal beneficiary, but recommended that the proceeds be interpleaded because of uncertainties in file documentation including the lack of the Oklahoma trustee's signature on the beneficiary agreement. Mr. Horne's advice was summarized in a memo:

> *SUMMARY*: There is a substantial risk whether payment is made to the son or to the estate.
>
> (a) There appears *less risk if payment is made to the son* since those involved seem sure he was the intended beneficiary.
>
> (b) There appears *more risk if payment is made to the estate* because of the insured's apparent intent to benefit the son.

> (c) *In either event*, exposure could be reduced by requiring an indemnity agreement from either the son or the estate.
>
> (d) An interpleader action is probably the safest course. However, the company could be exposed to a suit from the loser, i.e., the son or the estate. *Therefore, this alternative is not a complete solution either.* [emphasis added]. (App. 1.)

At a later meeting with officers of First Pyramid, and after further consideration, Mr. Horne concurred that paying the son without interpleader was "the best course." On January 19, 1978, respondent First Pyramid Life Insurance Company of America ("First Pyramid") paid James Stephen Stoltz ("Steve Stoltz") $2,000,000.

During separate litigation commenced on May 4, 1984, by the Internal Revenue Service to collect unpaid taxes, an attorney at Friday, Eldredge & Clark ("Friday Firm") acting as counsel for J.P. Stoltz's estate discovered and reviewed the Horne memorandum. The estate counsel considered the irregularities in the file and concluded that Steve Stoltz was the legal beneficiary, but did not report the discovery to any estate beneficiaries except Steve Stoltz, who was also executor of the estate. On September 3, 1987, over nine years after the policies had been paid, certain beneficiaries of the Stoltz estate commenced an action in Faulkner County Probate Court to challenge the management of the estate. Discovery in the probate action again produced the Horne memorandum. On April 20, 1989, those dissatisfied estate members commenced this action.

This case was brought originally as a negligence and breach of contract action coupled with a claim of bad faith. Because of the 11-year delay in bringing the claim, petitioner also alleged fraudulent concealment in an attempt to overcome the limitations defense. The original trial judge was the Honorable Perry V. Whitmore. Judge Whitmore overruled a motion for summary judgment on the limitations issue after hearing argument on two separate occasions, concluding:

> To avoid the loss of those causes of action, the plaintiff must prove either the defendant insurance company by its overt acts caused the legal right to be hidden and thereby become time barred; or there existed a specific legal relationship between the parties that in and of itself obligated an overt disclosure of the existence of those claims. An insurer/beneficiary relationship does not seem to create that legal obligation; however, on the claim of a factual coverup, the plaintiff should have its day in court.

At this point, the case remained a negligence and contract case with a claim of bad faith. The trial court recognized that the tolling of the statute under the doctrine of fraudulent concealment depended on proof that First Pyramid acted to conceal the claim.

Following Judge Whitmore's retirement, the limitations issue was again presented to the trial court. This time it was coupled with a motion for summary judgment which claimed that Steve Stoltz was the contract beneficiary as a matter of law. During the course of the argument, petitioner's counsel asserted

that the Friday Firm was implicated in a conspiracy to conceal a fraud from the estate while that firm was the estate's attorney. On the limitations issue, The Honorable Chris Piazza concluded that fraudulent concealment was an issue for the jury, but unlike Judge Whitmore who focused on conduct by First Pyramid, Judge Piazza emphasized petitioner's conspiracy allegation as creating a jury issue:

> Then you have this allegation, you know, that there was some type of fraud there that the association [by First Pyramid through the Friday Firm lawyer-Buddy Sutton] with the bank, with the loan that was paid off, the liabilities of the corporation the son paid off, how it was interconnected.

Here, Judge Piazza initially and correctly notified petitioner he would be required to present evidence of a fraudulent conspiracy between First Pyramid and the Friday Firm to escape the operation of the statute of limitations.

During the trial from August 5-10, 1991, petitioner abandoned the allegation of a conspiracy between the Friday Firm and First Pyramid and failed to present any evidence of such a conspiracy. The trial court submitted the case over the objection of First Pyramid on a general verdict under a contract theory coupled with instructions characterized as "fraud due to nondisclosure." Petitioner tendered no bad faith instruction and withdrew his negligence instruction immediately prior to the reading of the instructions. The jury returned a general verdict and Judge Piazza directed a verdict for compensatory damages of $2,000,000. The jury also awarded punitive damages

of $1,000,000. After considering several post-trial motions concerning trial errors and objection to the proposed form of judgment, the trial court entered judgment as assessed by the jury and awarded attorneys' fees and interest. First Pyramid filed a timely notice of appeal from the judgment to the Arkansas Supreme Court. Petitioner cross-appealed and sought additional interest and penalties on the jury verdict.

On December 21, 1992, the Arkansas Supreme Court unanimously reversed the lower court. With respect to the limitations issue, the Arkansas Supreme Court characterized petitioner's position in its opinion of December 21, 1992, as follows: "Representatives of the estate contend that the statute of limitations in this action was tolled by First Pyramid's allegedly fraudulent concealment of the controversy." On that issue, the dispositive sentence in the Court's opinion is: "There is simply no evidence of record that First Pyramid attempted to fraudulently conceal, 'coverup' or misrepresent to the estate the problem with determining the proper beneficiary of J.P. Stoltz's insurance policy."

Subsequently, on January 19, 1993, petitioner filed a Motion for Vacatur, to Disqualify and, in the Alternative, to Appoint a Special Master and Motion for Extension of Time to File Petition for Rehearing. In this pleading, petitioner alleged that the author of the opinion of the Arkansas Supreme Court, The Honorable Chief Justice Jack Holt, Jr., had favored First Pyramid because of a substantial social relationship between Chief Justice Jack Holt, Jr. and Herschel Friday of the Friday law firm. In the motion for

vacatur, petitioner's counsel relied upon a letter purportedly authored by his client. [App. 2]

On January 22, 1993, petitioner filed a petition and brief for rehearing in the Arkansas Supreme Court alleging, *inter alia,* that the Court's opinion holds that knowledge "obtained by a distant heir and a potential stranger to the estate, somehow constitutes notice to the estate, and its minor children, the rights and obligations, thereby violating the Fourteenth Amendment to the U.S. Constitution." [App. 3] Petitioner raised no other due process rights.

On February 15, 1993, the Honorable Chief Justice Jack Holt,Jr. filed an opinion declining to disqualify. [App. 4] On February 18, 1993, petitioner filed a Motion for Reconsideration of the decision not to disqualify. [App. 5] On February 22, 1993, the Arkansas Supreme Court denied the Petition for Rehearing, Motion for Stay and Motion for Reconsideration of Motion for Vacatur, to Disqualify and, in the Alternative, to Appoint a Special Master. The case was remanded to the trial court on March 15, 1993. Petitioner has now filed his Petition for Writ of Certiorari before this Court.

The Friday Firm is the state's largest law firm and is held in the highest regard. Mr. Herschel Friday is consistently recognized as one of the finest lawyers in Arkansas and the country and his integrity is beyond reproach. The client list of the Friday Firm includes many banks and leading businesses but neither the firm nor its clients have ever received "special" consideration from Chief Justice Holt since he was sworn in as the Chief Justice of the Arkansas Supreme Court in 1985.

The Friday Firm was not an interested party in this litigation. The Estate of J.P. Stoltz was represented by the firm and although petitioner continually made allegations of the existence of a conspiracy between the firm and First Pyramid, he dropped the allegations at trial and failed to present any evidence in support thereof. Mr. William H. "Buddy" Sutton-a leading Friday Firm lawyer-was not a member of the board of First Pyramid at the pertinent time.

The unsatisfied family members who bring this action continue to seek monetary relief and have recently filed an action against the Friday Firm. These family members have also settled their claim against their brother-Steve Stoltz-who served as executor of his father's estate.

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari is not filed in good faith. Essentially, petitioner claims that because he has "reliable information" that the Chief Justice of the Arkansas Supreme Court went quail hunting with a member of the Friday Firm, a law firm that was not a party to the proceeding and a firm that has now been sued by the petitioner, his due process rights were violated by the failure of the Arkansas Supreme Court to recuse itself. There are no cases in the United States where such an insignificant social relationship has resulted in the relief sought by petitioner. Indeed, if the Supreme Court found that this type of social interaction constituted grounds for recusal, virtually every trial and appellate judge in rural areas throughout the country would be forced to recuse.

REASONS FOR DENYING THE PETITION

A. Petitioner's Due Process Rights Were Not Violated Because Any Insignificant Social Relationship Between The Honorable Chief Justice of the Arkansas Supreme Court And A Nonparty Did Not Constitute Grounds for Recusal.

1. The issues presented do not concern constitutional and statutory questions that are likely to have widespread general impact.

The first two questions presented in the petition are whether and under what circumstances a party's due process rights are violated when an appellate judge refuses to recuse himself. This Court has already decided this question in *Aetna Life Ins. Co. v. Lavoie*, 106 S.Ct. 1680 (1986). As will be discussed later, *Aetna* is not in tension with this case, rather it simply is factually distinguishable because there was no reason for the Arkansas appellate judge to recuse. Thus, the question is settled and there is no reason for the Supreme Court to reconsider the clear impact of *Aetna*. In fact, this petition is nothing more than petitioner's last gasp to revive the case.

The discovery proceedings and trial of this matter are best described as acrimonious. The petitioner represents certain family members who have sued other family members over the estate of their deceased father. The respondent life insurance company, whose predecessor provided life insurance policies on their father, was caught in the middle. After a hard-fought trial, the Arkansas Supreme Court unanimously reversed the substantial jury award in its entirety because the applicable statute of limitations barred the action. Following that reversal, petitioner has as-

serted scandalous and libelous claims regarding the Chief Justice of the Arkansas Supreme Court and one of the most respected law firms in the State of Arkansas. It was only after the reversal that the petitioner and his counsel made these baseless charges of a "long standing social relationship with an interested party."

Somewhere along the way, courts must stand up and put a stop to petitioner's tactic of trial by terrorism, insinuation and innuendo. Petitioner's irresponsible and irrational demands that the Chief Justice and the entire Court should vacate the Court's opinion and step aside from the case cannot be sanctioned. If the Arkansas Supreme Court had recused or if this Court gave credence to the personal attack on the Chief Justice and the Friday Firm, seven new judges would be appointed by Governor Jim Guy Tucker. If those seven judges decided against petitioner, he would no doubt allege that Governor Tucker was somehow involved in the conspiracy that the petitioner continues to allege in the absence of any evidence. Moreover, petitioner's position, if given credence by this Court, would require reopening dozens of cases involving the Friday Firm which have been decided by the Arkansas Supreme Court since January 1, 1985, the date upon which Jack Holt, Jr. was sworn in as Chief Justice. If the Chief Justice or any other member of the appellate court was required to recuse from this case, the same could be expected in every future case in which the Friday Firm is involved. Moreover, the door will be open for every party who loses an appeal to search for some casual, social connection between a member of the Arkansas Supreme Court and someone involved, even tangentially, in the

matter. Likewise, every trial judge who hears a case involving a lawyer with whom he has had some social connection will be forced to recuse. Pandora's box would be opened, and its evils loosed, never to be captured again.

2. Petitioner's claim that the Chief Justice of the Arkansas Supreme Court had a longstanding social relationship with an interested party is baseless.

The petitioner's claim that a "substantial long standing social relationship" exists between the Honorable Chief Justice Holt and Mr. Herschel Friday is without support. Petitioner submits his own pleadings, self-serving affidavits and a copy of his complaint filed with the Arkansas Judicial Discipline and Disability Commission in "support" of his wild accusations. Petitioner attempts to hide behind a letter purportedly written by him and advice purportedly given by other, unnamed, lawyers and other unidentified persons. In his statement of the case, petitioner asserts that he instructed his attorneys to investigate whether a long standing and close friendship existed between the Chief Justice and the Friday firm. This "instruction" was given in the form of a letter from petitioner to his lawyers.

No lawyer should have caved in to a demand from a client that a Motion for Vacatur or Petition for Writ of Certiorari be filed, even if the client demanded it (the letter asked only for an investigation and advice) and even if the demand came from the client in a bona fide manner. It should be noted that the petitioner's letter giving rise to the Motion for Vacatur and the Petition for Writ of Certiorari has the same typeset as the Motion for Vacatur and brief in support thereof signed by the attorney. Further,

Counsel's affidavit in support of the motion for vacatur states that Mike Stoltz "contacted me around Christmas, 1992 . . . and informed me that he had heard of quail hunting trips taken to Herschel Friday's farm by Jack Holt, Jr. . . . and trips to leased land in the State of Texas." [App. 6] The letter, which is dated January 12, 1993, and stamped as received on January 13, 1993, says "I am writing to inform you of some very upsetting rumors I have heard in the last couple of weeks." Thus, the letter indicates that its purpose is "to inform" counsel of something that counsel's affidavit says had been discussed three weeks prior to the letter. The letter asked that counsel "investigate these rumors immediately and notify me of my legal options." However, the letter declined to identify the source of the information, citing only a "reliable source," which is an extremely odd way for a client to ask his lawyer to carry out an investigation. By January 19, 1993, six days after the letter is stamped as received by counsel, the investigation had been completed, a course of action had been determined, legal research had been completed, a lengthy brief had been written, and the motion for vacatur had been filed.

Petitioner's lawyer should have informed his client that casual, social contact, such as a quail hunting expedition,[1] is no grounds for disqualification and does not give rise to an appearance of impropriety. Petitioner's lawyer should have informed his client

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[1] For purposes of this portion of the brief, respondent will give credence to the claim that a quail hunting expedition had occurred, but in fact there is absolutely no evidence that Chief Justice Holt has ever been quail hunting with Herschel Friday or anyone else from the Friday law firm.

that there are no cases in the United States where a judge has been disqualified because he had been quail hunting with some lawyer who might or might not stand to benefit from a decision of the court. The applicable law is stated in *Matthews v. Rogers*, 279 Ark. 328, 333-4, 651 S.W.2d 453 (1983), where the Arkansas Supreme Court stated:

> In this State trial judges often know most, if not all, of the attorneys who practice before them. They may have attended the same schools, churches, or belong to the same civic clubs. Most are members of the same bar association. . . . Those friendships within the bench and bar do not, of themselves, cause prejudice. The public and the clients are aware of their mutual friendships and acquaintances.

"Friendship with a member of the bar is not a ground for recusal." *Committee For Utility Training, Inc. v. Hamilton*, 290 Ark. 283, 286, 718 S.W.2d 933 (1986). There is no allegation here that Mr. Friday and Chief Justice Holt belong to the same church, belong to the same civic organizations or visit in one another's homes. The Arkansas Supreme Court correctly deduced that if it gave in to petitioner's demands it would destroy the possibility of finding local judges to hear cases in most, if not all, of the judicial districts in Arkansas, where the bar is small and judges and lawyers unavoidably have social acquaintances which are often much closer relationships than that alleged to exist between Mr. Friday and Chief Justice Holt.

The assertion that the Friday Firm stood to benefit from a reversal in this case is, like so many other

allegations made by the petitioner, a distortion of the truth. If the Arkansas Supreme Court wanted to protect the Friday Firm, the best way to do that would have been to affirm the judgment. By reversing, the door was opened for petitioner to make a claim against the Friday Firm.[2] Had the judgment been affirmed, petitioner would not have had a claim against that firm. Moreover, as petitioner well knows, respondent filed a third-party complaint before the trial against four other parties, and the Friday Firm was not among them. Indeed, it is hard to fathom what respondent could have alleged against the Friday Firm. Is it petitioner's suggestion that First Pyramid could have sued the Friday Firm for not advising the Estate of J.P. Stoltz to sue First Pyramid?

Thus, the insinuation that the Arkansas Supreme Court favored the Friday Firm by reversing the judgment in this case is, to put it charitably, a flight of the imagination. Further, a review of the record of the Arkansas Supreme Court clearly reveals that the Friday Firm does not receive special treatment from the Arkansas Supreme Court. A simple review of recent advance sheets reveals a number of cases in the past few months in which the Arkansas Supreme Court ruled against the Friday Firm's interest. Recently, the Arkansas Supreme Court ruled against the Friday Firm itself in *Pope County v. Friday, Eldredge & Clark*, 313 Ark. 83, 852 S.W.2d 114 (1993). In *Pope County*, the Arkansas Supreme Court decided that an action against the Friday Firm for legal malpractice

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[2] In fact, on May 3, 1993, petitioner filed a complaint in Pulaski County Circuit Court against the Friday Firm styled *J. Michael Stoltz v. Herschel H. Friday d/b/a the Law Firm of Friday, Eldredge & Clark, et al.*, No. 93-2813.

was not barred by the statute of limitations. In another recent case, *Arkansas Indus. Dev. Comm'n v. FABCO*, 312 Ark. 25, 847 S.W.2d 13 (1993), in which Mr. Friday was representative counsel, the Arkansas Supreme Court denied the Friday Firm's client an award of reasonable attorneys' fees but awarded attorneys' fees to the opposing party. See also *Southwestern Bell Tel. Co. v. Blastech, Inc.*, 313 Ark. 202, 852 S.W.2d 813 (1993); *Potlatch Corp. v. Arkansas City School Dist.*, 311 Ark. 145, 842 S.W.2d 32 (1992); *Porter v. McCuen*, 310 Ark. 562, 839 S.W.2d 512 (1992); *Younts v. Baldor Electric Co.*, 310 Ark. 86, 832 S.W.2d 832 (1992).[3]

Petitioner's wild accusation that Chief Justice Holt is somehow biased in favor of the Friday Firm is equally ludicrous. Once again a review of the public record is compelling. Chief Justice Holt has authored several majority opinions in cases involving the Friday Firm, and in the preponderance of cases wrote an opinion adverse to the interests of that firm. In fact, a computer search[4] identified eighteen majority opinions authored by Chief Justice Holt in which the Friday Firm represented a party—only seven of those

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[3] Ironically, the day petitioner filed the Motion for Vacatur in the Arkansas Supreme Court, that court issued an opinion in a major case deciding by a 4-3 vote against the interest of the Friday Firm. *Hasha, et al. v. City of Fayetteville, et al.*, No. 92-578 (Jan. 19, 1993). Chief Justice Holt joined the majority opinion.

[4] Chief Justice Holt took the bench in 1985. A computer search using Case Base, a research database with Arkansas cases on CD-ROM, was conducted for all cases since 1985 authored by "Holt" in which "Friday" occurred in the "Attorneys on Appeal" segment of the official report. Each case was then verified individually and the outcome recorded.

opinions favored the Friday Firm. Thus, in nearly two-thirds of the cases Chief Justice Holt rendered an opinion adverse to the Friday Firm. A table listing all eighteen cases and the outcome of each is attached hereto as Appendix 7.

The opinions by Chief Justice Holt adverse to the Friday Firm include one 4-3 decision in a case of first impression that easily could have gone the other way. Mr. Friday was a signatory to the brief in that case. *Moore v. Missouri Pacific R.R.*, 299 Ark. 232, 773 S.W.2d 28, 6 A.L.R. 5th 1188 (1989). In another case, Chief Justice Holt wrote the majority opinion against the Friday Firm and then dissented when rehearing was granted and the Court ruled in favor of the Friday Firm. *Register v. Oaklawn Jockey Club, Inc.*, 306 Ark. 318, 811 S.W.2d 315, opinion on reh'g, 306 Ark. 321, 821 S.W.2d 475 (1991).

Further, petitioner misstated several Arkansas and United States Supreme Court decisions in support of his assertion that the Arkansas Supreme Court was required to recuse itself in this matter. In *Johnson v. Sturdivant*, 295 Ark. 622, 758 S.W.2d 415 (1988), Justice John Purtle authored an opinion by the divided Arkansas Supreme Court in which a $5,000,000 plaintiff's award was affirmed. The critical issue in the underlying case was whether the driver of a log truck involved in an accident was an independent contractor so as to insulate other defendants. At the time, Justice Purtle had a claim against one of the insurance companies representing a defendant and that claim related to an issue of an independent contract which, as noted, was the main issue in *Sturdivant*. In recognizing the need for recusal, the Arkansas Supreme Court relied upon *Aetna Life Ins.*

Co. v. Lavoie, 106 S.Ct. 1680 (1986) and particularly noted that in the Aetna case "it was suggested that Justice Embry had written an opinion deciding his own lawsuits." In light of *Aetna* and *Lilejeberg v.Health Services Acquisition Corp.*, 486 U.S. 847 (1988), the Arkansas Supreme Court recused. Neither *Johnson v. Sturdivant* or *Aetna Life Ins. Co. v. Lavoie* have any precedential value for this case. Justice Holt did not have any personal interest in the case nor did he have a personal involvement with any of the parties.

Petitioner also cites *City of Jacksonville v. Venhaus*, 302 Ark. 204, 788 S.W.2d 478 (1990) and *Patterson v. R.T.*, 301 Ark. 400, 784 S.W.2d 777 (1990) in support of his contention that his due process rights have been violated. However, in *Venhaus*, the record clearly reflected that the chancellor exhibited bias and had a personal interest in the matter exhibited by ordering that $700,000 of taxpayers funds be given to assorted charities to which she was connected. Likewise, in *Patterson v. R.T.*, the same chancellor exhibited her bias when questioning witnesses on the record. Conversely, in the instant action Justice Holt exhibited no bias and, in fact, had no relationship or interest with any of the parties to the litigation.

Much of petitioner's brief in support of Petition for Certiorari is devoted to rearguing the underlying case.[5] However, the only real issue determined by the

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[5] Included as a part of petitioner's effort to reargue the case is Appendix Ex. A to the Brief, which purports to be "an excerpt from the testimony of witnesses and exhibits at trial." In fact, it is a tendentious, argumentative, and selective abstract of testimony that takes much out of context and actually fabricates

Arkansas Supreme Court was whether there was substantial evidence that First Pyramid engaged in fraudulent concealment of petitioner's claim. There was and is no evidence, much less substantial evidence, of fraudulent concealment. The fraudulent concealment issue was argued extensively in briefs filed before the Arkansas Supreme Court and at oral argument. Simply put, there is no evidence of an impropriety by the Arkansas Supreme Court and there is no need to reargue the limitations issue.

B. The State of Arkansas Did Not Violate Petitioner's Right To Due Process And *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478 (1988) Is Inapplicable.

Petitioner suggests that the opinion of the Arkansas Supreme Court is contrary to *Tulsa Professional Collection Services, Inc. v. Pope, supra.* That assertion, like so much of petitioner's counsel's argument is misplaced. The issue in *Pope* was whether the involvement of the Oklahoma probate court in executing the non-claim provision of the. probate code constitutes state action under the Fourteenth Amendment. 485 U.S. at 486. Nothing in the Arkansas Supreme Court's opinion in this case even remotely addresses that issue. The opinion in *Pope* is crystal clear that a private party may invoke a statute of limitations without implicating due process. *Id.* Therefore, the

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part. See the addendum to this brief. Petitioner did not complain about respondent's abstract of these matters before the decision on the merits (Cf. Rule 9(e)(1)), but now he has re-abstracted the evidence to suit his purposes, a clear violation of Rule 9(d). Among other things, this new, partial argumentative abstract violates the requirement that the abstract be "without emphasis."

Pope opinion and the opinion in this case of the Arkansas Supreme Court of December 21, 1992, are entirely consistent.

It should also be noted that this section of the Petition for Writ of Certiorari reveals the inconsistencies in petitioner's positions, and the desperation of petitioner's counsel to attempt to resurrect his multimillion dollar verdict. Petitioner twists and turns the law to suit his purpose. On the one hand, the petitioner has repeatedly argued that the estate was unaware of its potential claim until "8/8/88" because the only person with notice was the executor, Steve Stoltz, who had a conflict of interest with the other beneficiaries. Therefore, petitioner argues the statute of limitations was tolled until the estate received notice independent of the executor.

At trial, however, it was revealed that a sister of J.P. Stoltz and a brother-in-law (both of whom are estate beneficiaries represented by petitioner) had actual notice that J.P. Stoltz had at one time named his estate as the beneficiary of the life insurance policy. The opinion of the Arkansas Supreme Court noted this fact and now petitioner cries foul and asserts that the estate cannot be held accountable for knowledge possessed by other beneficiaries. Petitioner, thus, apparently concedes that notice to the executor and the attorneys for the estate was the only notice that could, and did, bind the estate. See e.g. *Ford's, Inc. v. Russell Brown & Co.*, 299 Ark. 426, 773 S.W.2d 90 (1989); *Ingram v. Luther*, 244 Ark. 260, 424 S.W.2d 546 (1968); *Farr v. Newman*, 14 N.Y.2d 183, 199 N.E.2d 369 (N.Y. App. 1964). Since the executor, the estate attorneys and independent beneficiaries all received notice of the potential claim, petitioner is

forced to take inconsistent positions in an attempt to have his cake and eat it too.

In summary, this Court has previously held that a private person's assertion of an applicable statute of limitation does not constitute state action. Thus, there was no due process violation and, further, notice was proper and binding on the estate.

CONCLUSION

The petition filed in this matter, like other pleadings filed by petitioner, does nothing but repeat arguments already made, considered and rejected. Further, the petitioner makes the irresponsible and scandalous assertion that the Arkansas Supreme Court issued a fraudulent opinion based on nothing more than an unfounded rumor that the Chief Justice allegedly went quail hunting and participated in other social activities with Herschel Friday of the Friday, Eldredge & Clark law firm. "Judges are presumed to be impartial and the party seeking disqualification bears a substantial burden proving otherwise." *Korokov v. Korokov*, 33 Ark. App. 194, 197, 803 S.W.2d 948 (1991). Petitioner is light years away from meeting this burden. Neither First Pyramid nor the judicial system should be held hostage to the kind of tactic that has been the pattern in this case. It is the duty of the Court to stand up and say, enough is enough. Giving in to petitioner's tactics would be like giving in to terrorists who threaten destruction or murder unless ransom money is paid. It only encourages the same kind of behavior in the future.

August 25, 1993

Respectfully submitted,

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APPENDIX

APPENDIX 1

MEMORANDUM

RE: First Pyramid Policy Issued to James Patrick Stoltz, Deceased
DATE: January 18, 1978

SITUATION: James Patrick Stoltz died December 18, 1977 while covered by four policies issued by First Pyramid. Two of these policies were connected with the Flex 70 Trust totalling $2,000,000.

Jim Duran requested that we review the policies prior to payment, to make sure proper payment is being made. In doing so, certain discrepancies were noted concerning the $1,950,000 term policy. The $50,000 whole life policy may have similar problems and should be reviewed. The purpose of this Memorandum is to highlight the sequence of events concerning the problem and the possible positions and courses of action which may be available.

I. Sequence of Events:

1. $1,950,000 Policy was issued to "The Insured" dated February 26, 1976 and named "The Estate of the Insured" as beneficiary.

(Line 29 in the application where "owner" designated is garbled) (Dated 12/18/75) (Applicant shown as Flex 70 Trust however).

2. Transfer of Ownership and Beneficiary Agreement signed by the Insured as "Policyholder" on May 1, 1976, naming James Stephen Stoltz (son) as owner and primary beneficiary.

The Agreement was filed and record made by Company on March 22, 1976 Title page on policy changed to strike "Insured" and show James Stephen Stoltz, son, as owner,

but beneficiary left as "The Estate of the Insured" on face of policy. File copy has notation that beneficiary was changed by rider and the same may have been inserted in the policy.

3. Ron Mason memo to Paul Dixon on August 9, 1976 that changes in ownership are ineffective without Trustee's signature. Requested new change forms be completed if Mr. Stoltz still wants change, or return of policy for removal of previous change of ownership otherwise. (Beneficiary not referred to)

4. Worksheet prepared by A. Gray on 8/18/76 directing that new policy be typed showing ownership as "Flex 79 Trustee" and directing removal of 3/1/76 ownership transfer from policy. No written direction or consent by insured or son present found in file. Acknowledged 8/31/76.

5. New (substitute) policy issued 8/76 showing as owner "The Insured and Flex 70 Trust" dated February 26, 1976 and naming as beneficiary "The Estate of the Insured." Any prior beneficiary rider which may have been included was apparently removed.

6. Immediately prior to death, J. Moses responding to inquiry by agent stated that son is owner and beneficiary which agent responds is proper. Agent requested copies of March, 1976 ownership and beneficiary changes, which are supplied.

7. December, 1976, Mr. Stoltz dies.

8. December 20, 1976, Jim Duran notified David Kane that son is beneficiary and requested claim for completion and return of policy which is done.

II. Analysis:

The objective in determining how to properly make payment at this time is to prevent, if possible, exposure to suit by another party at a later date claiming payment should properly have been made to such party.

INTENT OF PARTIES: All indications at this time are that the intent of the parties was that the son be beneficiary of the policy.

Judy Moses understands the purpose of the August, 1976 change was to name the son as owner and beneficiary ab initio to avoid the possibility of the policy being pulled into the insured's estate and possibly avoid its seizure by taxing authorities for income taxes allegedly due. She believes it was erroneous to name the insured or his estate in any fashion on the policy page prepared in August dated February 26 1976.

Elizabeth Oswald understands the purpose of the August, 1976 change was to show how the policy should have originally been issued pursuant to the application (Insured and Flex 70 Trust as owner and Estate as beneficiary) and that the March, 1976 ownership and beneficiary changes were intended to remain in force, (despite the fact that this is inconsistent with the Mason memo requiring the Flex 70 Trustee's signature for this to occur).

She believes it was erroneous not to include the ownership and beneficiary changes as riders at that time.

The agent in December, 1976 conversation with Judy Moses (prior to Insured's death) expressed satisfaction with her statement that the son was owner and beneficiary at that time stating this was the intent of Mr. Stoltz.

SON AS BENEFICIARY: The designation of the insured's son as owner and beneficiary would seem to be effective under the following circumstances.

1. If the fact that the policy was originally issued inconsistent with the application does not control over the actual policy specifications; if the insured had the power to change ownership and beneficiary in March, 1976 and did so, and if the August, 1976 change is of no effect since not authorized or consented to by the owner of record when accomplished. Mason's memo would have been

incorrect when written under this reasoning. The fact the policy when actually reissued did not reflect these changes must also be considered as having no effect.

2. The second line of reasoning leading to this result would follow the reasoning of #1 except that the August, 1976 changes dated February, 1976 were permissible because of consent or otherwise effective ab initio, and the March, 1976 ownership and beneficiary changes are effective because they follow the effective date of the changes. This reasoning must disregard the Mason memo requiring Trustee signature, by reasoning that some type of consent is present, as well as the fact the changes were not included as riders in the policy. (Oswald understanding)

3. As a third alternative, consider #2 except that the policy as originally issued was inconsistent with the application and the application controls.

4. A fourth line of reasoning would be that the August change should have named on the policy specification page the son as owner and beneficiary, removing any need for new beneficiary and ownership change forms and all parties were consenting to this despite fact no written record was present. This also assumes this clerical correction may be made at this time.

There are certain other variations but these are the principal themes. It should be noted that none seems fully satisfactory from a contract law standpoint since certain terms of the contract must be ignored, proper signatures were not obtained, or required by the Company, certain changes must be allowed "ab initio" which is of questionable validity, especially in the absence of a clear intent, etc.

ESTATE AS BENEFICIARY: Circumstances which would indicate that the Estate of the insured is the proper beneficiary are as follows:

(a) If the signature of the trustee was required at any point and was not obtained. (Several variations)

(b) If the final policy page prepared as the most recent statement of Company ownership and beneficiary records,to which the insured could have objected if he desired to, controls.

III. Alternatives:

The principal dangers of each course of action involves exposure to (a) contract liability to another party after payment to a first party had been made and (b) tort liability for negligence or misrepresentation to a person other than the person to whom payment was made. Various procedures which could be followed to possibly cut off such actions include use of interpleader or formation actions to clarify the contract, obtaining indemnity or waiver agreements to cover possible liability, etc.

Contract actions could conceivably arise regardless of whom payment was made to. These could possibly be successful if the court construed the situation contrary to the Company's interpretation.

A similar situation is present with tort actions if a court found that the intent of Mr. Stoltz was to make payment one way and, through error by the Company, or perhaps its agent, this intent was not carried out. The information we have at this point is that the intent was to benefit the son. The possibility that someone else could come forward later with contrary evidence cannot be ignored.

The estate and the son do have adverse interests in this case. Though the son is executor of Mr. Stoltz's will, the will leaves the residue of the estate to First National Bank in Little Rock as trustee of a trust for about fifteen different parties. If anyone had the understanding these policy funds would pass to such trust, particularly if no other

significant assets pass to the trust, further inquiry may be forthcoming from the Trustee or beneficiaries of the trust.

The advantage of interpleader or reformation actions is that contract actions by other parties should be cut off. However, this may have no effect on negligence actions and would alert all parties to the problem. John Peace is preparing a memorandum on this aspect of the case.

If payment was made to the son, an indemnity agreement from him could reduce exposure. The indemnity agreement would be broadly drawn. Exposure to a negligence suit by the estate if the intent of the insured was found to be to leave the proceeds of the policy to the estate and trust established in the will would still exist.

I.R.S. PROBLEM: We do not know whether more taxes would be due if proceeds are paid to the beneficiary or to the estate. It is possible, for example, that the I.R.S. might take the position the proceeds were payable to the estate if more taxes would be due than if paid to the son. We mention this only to raise the question as an item for consideration.

REINSURER: Since a substantial amount of the proceeds are from reinsurance, the question arises should the situation be discussed with the reinsurer. We mention this aspect only to make sure all important items are considered.

$50,000 POLICY: A review of the $50,000 Flex 79 whole life policy originally issued in the same manner as the $1,950,000 policy indicates that no ownership change form was executed regarding it in March, 1976, a beneficiary change only being signed, naming the son as beneficiary. When the August 1976 changes were made, instead of a new policy page being typed the phrase "and Flex 79 Trust" was added as "The Insured" in the ownership blank, but no change was noted as to the beneficiary des-

ignation of "The Estate of the Insured." Any beneficiary change rider which may have been present was apparently removed at that time.

On this basis, the analysis of the situation on this policy would be the same as for the $1,950,000 policy.

SUMMARY: There is a substantial risk whether payment is made to the son or to the estate.

(a) There appears less risk if payment is made to the son since those involved seem sure he was the intended beneficiary.

(b) There appears more risk if payment is made to the estate because of the insured's apparent intent to benefit the son.

(c) In either event, exposure could be reduced by requiring an indemnity agreement from either the son or the estate.

(d) An interpleader action is probably the safest course. However, the Company could be exposed to a suit from the loser, i.e. the son or the estate. Therefore, this alternative is not a complete solution either.

APPENDIX 2

January 12, 1993

Charles Phillip Boyd, Jr.
Davidson Law Firm, Ltd.
P. 0. Box 1300
Little Rock, AR 72203

Dear Charlie;

I am writing to inform you of some very upsetting rumors I have heard in the last couple of weeks.

I was told that Chief Justice Holt has a very close personal relationship with members of the Friday Law Firm. I heard from a reliable source that he has been quail hunting in Mayflower on Mr. Friday's land and went on a hunting excursion in Texas on Mr. Friday's plane. Charlie, if these rumors are true I would think this relationship could possibly affect Judge Holt's opinion in our case. I feel this is terribly wrong and unethical.

Charlie, as you well know I have felt very strong about the way the Friday Firm handled my dad's estate. I still feel they played a major role and are at the root of many of our problems today. Judge Holt, I would think, would be well aware of the Friday Firm's possible exposure in this case if he read the transcript. Also you may recall during your oral argument in front of the Supreme Court that one of the judges pointed out the Friday Firm's possible exposure.

Charlie, I'm not a lawyer but I would think that if these rumors are true Judge Holt should have stepped down from this case just like Judge Dudley. At the very least, ethically he should have disclosed this conflict.

On behalf of myself and as special administrator for the estate I want you to investigate these rumors immediately

and see if there is any validity to them and notify me of my legal options.

Sincerely,

/s/ Mike

Mike Stoltz

APPENDIX 3

IN THE ARKANSAS SUPREME COURT

NO. 92-4

FIRST PYRAMID LIFE INSURANCE COMPANY OF AMERICA; USABLE INSURANCE COMPANY
APPELLANTS

VS.

J. MICHAEL STOLTZ, As Special Administrator of the Estate of J.P. Stoltz, Deceased
APPELLEE

PETITION AND BRIEF FOR REHEARING

This Court's Opinion contradicts and/or ignores the sworn testimony of the witnesses who testified, under oath, before a jury, in these proceedings, the documents introduced into evidence, and the law read to the jury by way of Instructions without objection. The Court's Opinion contravenes universal law by holding that knowledge (assuming arguendo that same exists here) obtained by a distant heir, and a potential stranger to the Estate, somehow constitutes notice to the Estate, and its minor children, of their rights and obligations, thereby violating the Fourteenth Amendment to the U.S. Constitution. The Appellee's counsel certifies his belief that this Petition has merit, and is not filed for the purpose of delay.

I

FACTS

First Pyramid Life Insurance Company (FPL) wrote a policy of life insurance totalling $2 Million on the life of J.P. Stoltz. The contractually designated beneficiary was

his Estate. (R.3690) There was conflicting evidence regarding whether the deceased insured wanted his eldest son, or his Estate, to be the beneficiary, but as a matter of contract, on paper, in black and white, the Estate was the designated beneficiary.

The Defendant insurance company saw it had a problem when the insured died due to the manner in which it had handled its paper work. It called in its attorneys for advice on what it should do.

Both of its attorneys recognized the beneficiary discrepancy, and advised it that interpleading the money was the safest course of action to take, but that said action would "alert" the losing party to its potential claim, and could subject, or expose, the insurance company to a lawsuit from the loser. (R.4540-4) This "discrepancy in the proper beneficiary" was not, at any time, passed on to the Estate by the insurance company. (R.3949, 3959-60)

On the same date it received these Memos from its attorneys, the insurance company allegedly had a meeting, wherein the alternative of interpleading the money, and its concurrent exposure to a lawsuit by the loser, was discussed. The insurance company decided to pay the son, *because he was the only one who had made a claim for the proceeds, and was the only one who thought he had a claim to the proceeds.* (R.4354-55) The Estate was never told it had a potential claim to the proceeds. The insurance company decided that, if it was subject to being sued by the loser if it alerted all parties to their potential claim, it would be better off to pay the son, who knew he had a claim, and had made a claim, and take its chances that the other entity with a claim to the proceeds, i.e. the Estate, would never find out about same.

The Estate had numerous debts, and was involved in a procedural morass that could last decades based on the Will of the deceased. First National Bank was the Estate's largest creditor, and was also the Trustee of the Trust to

which these proceeds would have passed had the Estate been paid. Paying the money to the son, in addition to the aforementioned motivational factor, would potentially keep the money out of the Estate, and, if the Bank required Steve Stoltz to sign a personal guarantee insuring a $1.62 Million debt, for which Polyvend stock was pledged, it could assure itself of being paid. Steve Stoltz would see this debt was paid off, because the alternative was selling a multimillion dollar company, Polyvend, which was his if he could run it for ten (10) years. If he sold the company within a ten (10) year period of time from his Father's death, he would have to split the excess surplus with his Brothers and Sisters. Furthermore, Herbert Thomas, *the owner of FPL and the largest stockholder of the Bank,* would have a way of ensuring that the Bank's debt was paid.

The Friday Law Firm represented J.P. Stoltz while alive, Steve Stoltz as Executor of the Estate, Steve Stoltz individually, First National Bank as the largest creditor of the Estate, First National Bank as the Trustee to which these proceeds would have flowed had the Estate been paid, the Defendant insurance company itself, Polyvend Corporation, and the insurance agency which sold the policy to the deceased, at all pertinent times. (R.3891/3907) Herbert Thomas, who owned the insurance company, was the largest stockholder of the Bank. Buddy Sutton, one of the senior partners of the Friday Law Firm, was on the Board of Directors of the insurance company. Herschel Friday was on the Board of the Bank. (R.3947-48) In addition to the aforementioned reasons, theinsurance company, and the Friday Firm, would rather Steve Stoltz be paid than the Estate because it is much easier to control and manipulate one twenty-five (25) year old man to their mutual advantage than it is an Estate comprised of numerous individuals and entities (both local and national), Banks, Trusts, Probate proceedings, litigation, etc. Within six (6) days after paying Steve Stoltz the proceeds, he

bought $3,000,000 worth of insurance from FPL, and arranged the purchase of large FPL policies for two of the employees of Polyvend, the corporation he took over from his Father. (R.4413-15, 4804-05)

The IRS included the $2 Million worth of insurance proceeds in the deceased's Estate. The Estate paid the tax on money it did not receive. The Friday Law Firm sued the IRS for a refund on behalf of the Estate. During this period of time, if not before, the Friday Firm saw FPL's files. They tendered to the IRS certain FPL files regarding these policies, but whited out certain portions. The IRS ultimately settled the case for almost what it claimed in the first place, and told the Estate, through the Friday Firm, that it had whited out certain portions of these files, and that the Estate never did prove that it was not in fact the proper beneficiaries of these policies. The Friday Firm was legal counsel for the insurance company also at this time, and had members on its board. These actions were done to protect First Pyramid as much as to benefit the Estate.

There is conflicting evidence regarding whether or not Steve Stoltz was ever told of the Estate's potential claim to these proceeds. A letter from James Saxton dated June 7, 1983 tells him the Estate has a potential claim, but also tells Steve Stoltz, as Executor and individually, that he has not reviewed the entire insurance company file. James Saxton and Steve Stoltz both testified at trial that neither Steve Stoltz, nor James Saxton, ever apprised the Estate that it had a potential claim because James Saxton was of the opinion Steve Stoltz was the proper beneficiary. (R.4799) Unequivocably, no one else in the Estate was ever told by FPL it had a potential claim to these proceeds. (Regardless, FPL did not submit a *single* limitations Instruction, *never* told the jury it had a normal five (5) year statute of limitations, nor that notice to an attorney is, absent a conflict, notice to the client, thus bringing about a "conflict" instruction from the Plaintiff. So, what dif-

ference should all this make? This Court addresses same in its Opinion so it is cursorily discussed here.)

No distributions of any kind have been made in this Estate, and said Estate is subject to numerous lawsuits filed in the Chancery and Probate Courts of Faulkner County. (R.4603) The First National Bank of Little Rock would have pursued this matter on behalf of the Estate had it been told the Estate had any potential claim to these proceeds. (R.3950-53) The attorneys for FPL advised it of said Trustee's probable actions if it were apprised of the Estate's claim, and yet neglected to apprise the Estate of same. Furthermore, FPL was apprised of the conflicts of interest between the son receiving this money individually, and serving as Executor of the Estate, prior to paying the money. (R.4548-49)The son was required to sign an Indemnity Agreement when he received these proceeds. The only time FPL had an individual sign an Indemnity Agreement was when it was afraid someone else had a claim to the policy proceeds, and wanted to reduce its exposure. (R.4354-55, 4544-45)

Sometime around September of 1987, several members of the Estate began to question the way the Estate was being managed by the Friday Law Firm and Steve, whom said firm was "advising" individually. They secured the services of new attorneys to assist them in investigating the Estate, and were apprised, for the first time, on August 8, 1988, that the Estate had a potential claim to these proceeds, or that Steve Stoltz had been paid instead of the Estate. (R.3864-67) They were in shock, and felt like they had been lied to. (R.4593-96) This is the first knowledge the majority of the members of the Estate had that the Estate was *ever* the beneficiary of these policies. An elderly Aunt and Uncle testified they had been told that the Estate was the beneficiary prior to the insured's death. However, they had never been told the Estate *had not been paid*, and, despite reasonable diligence and viligence, were not apprised of same prior to August 8, 1988.

(R.4844//859) This Aunt and Uncle thought the Friday Firm was looking out for their best interest, and, being as *no* property had passed through the Estate to the heirs and beneficiaries, had no reason to suspect that they would not receive whatever money they had coming, along with the other heirs and beneficiaries, at the time the Estate's property was distributed.

The Last Will and Testament of the deceased indicates that the nine (9) Brothers and Sisters, the aforementioned Aunt and Uncle, Hendrix College, and St. Joseph Catholic Church were to receive the income from the property of the Residuary Trust, i.e. these insurance proceeds, as long as the heirs and beneficiaries lived. Upon the death of the last heir/beneficiary, the corpus of the Trust was to pass to St. Joseph and Hendrix College. Thus, the elderly Aunt and Uncle were only supposed to receive a pro rata split, along with eleven (11) or so other individuals/ entities, during their life time. (D.'s Exh. 149) The jury inferred, as the law allows them to do, and as anyone using common sense would, that the income from the life insurance policies was not that big a deal. Being lied to was.

A lawsuit was filed on April 20, 1989. A Pulaski County jury found the Estate was the contractually designated beneficiary, and rendered a verdict on same. The record indicates the Trial Court complimented the jury throughout the trial on its attentiveness. The Supreme Court has the obligation to give deference to this fact.

Regardless of how this Court views the evidence, *no one* can state that the foregoing dissertation of *facts* is not a reasonable conclusion by a reasonable jury, and supported by substantial evidence. This Court may not want this to be the result, may not want the jury to have found this way, may not think the decision was right (although no one who sat through the trial and viewed same in an impartial manner could possibly hold otherwise), but, nevertheless, unless it totally disregards the sworn testi-

mony of the warm bodies who took the witness stand in front of the jury,and the documents from FPL's own file, it must uphold this verdict. To hold otherwise, would make our jury system a sham. Why not just submit Affidavits to the Supreme Court and allow it to decide the facts, the law, and the decision? That is strong language from the Appellee. But, he has the transcribed record in his possession to back him up, and will stand, flat footed and entrenched, upon same. (See Abstract of testimony attached to Brief in Support of Motion for Vacatur, To Disqualify And, In The Alternative, To Appoint A Special Master, And Motion For Extension Of Time To File Petition For Rehearing, filed January 18, 1993.)

II

APPLICABLE LAW

This Court knows the law when viewing a jury verdict on Appeal. If there is any substantial evidence to support the jury verdict, same is not disturbed. The evidence is viewed in the light most favorable to the party in whose favor said verdict rests. This Court does not weigh the facts for the purpose of determining in whose favor the preponderance of the evidence lies. *Kratzkev Nestle v. Beich, Inc.*, 307 Ark. 158, 817 S.W.2d 889 (1991); *Missouri Pacific Railroad Co. v. Clark*, 246 Ark. 824, 440 S.W.2d 198 (1969). The reviewing Court cannot disturb the jury's conclusion as to substantiality of the evidence unless there is no reasonable probability in favor of the Appellee's version, and then only after giving legitimate effect to all presumptions in favor of the jury's findings. The jury is the sole judge of the credibility of the witnesses. *Beard v. Coggis*, 249 Ark. 518, 459 S.W.2d 791 (1970); *Bradbury v. Gower*, 247 Ark. 704, 447 S.W.2d 247 (1969).

Fraud, or fraudulent concealment that will toll the statute of limitations, is a question of fact that can be inferred from the evidence, just as any other fact. *Moore Ford Co.*

v. Smith, 270 Ark 340, 604 S.W.2d 943 (1980). Court's Instruction No. and 9. (R. 4875/4878) The question of fraudulent concealment, and the concurrent tolling of the statute of limitations, is a fact question judicially recognized as such by this Court for decades. *Crossett Health Center v. Crowell*, 221 Ark. 874, 256 S.W.2d 548 (1983); *Schenebeck v. Sterling Drug Co., Inc.*, 423 F.2d 989 (8th Cir. 1970); *Mulligan v. Lederle Laboratories*, 786 F.2d 859 (8th Cir. 1986); *Robinson v. White*, 633 F.Supp. 954 (W.D. Ark. 1986).

For reasons that will be gone into in greater detail later, the Appellee is convinced no one on this Court carefully read the entire record of these proceedings. In fact, the attorney for the Appellee has been told by a member of the Court that this Court generally does not read the record itself because of the time constraints involved, and because it is not going to overturn questions of fact unless same are absolutely, unequivocably, unargumentatively unsupported. The reason for same is that this Court cannot glean the demeanor of the witnesses, their facial expression, their tone of voice, etc. from a cold transcript. The cold hard fact is that there is no conceivable way the six (6) members of this Court assigned to hear this matter, and probably not the Chief Justice himself, had time to read - one time - the entire transcript. Same is probably not necessary if an issue of law is to be decided, and *that* is what this Court is supposed to do. But, it is inconceivable this Court can properly overturn a question of fact when it was not present in the Courtroom along with the Trial Judge, live witnesses, a jury, and numerous other individuals. Furthermore, how can this Court, in discharging its obligations to the people of the State of Arkansas, overturn a question of fact when it does not even read the transcript? A reading of the Abstract, regardless of how well it,s done, is simply insufficient.

The undersigned knows that one of the three volumes of testimony from witnesses, including witnesses whose

testimony is taken out of context by this Court, was actually misplaced. The Appellee wonders when and where it was misplaced, and how it was found. Obviously, no one can read a transcript that cannot be located. The Court does follow the "inferences" advocated by the *Appellant* in its Opinion. There was ample other testimony contained in this volume to counter any such inference, were the testimony from all witnesses read, and all *inferences* from said testimony read in the light most favorable to the *Appellee.*

This Court is an Appellate and is supposed to review and decide issues of law. What is the issue of law advanced on Appeal that merits a reversal of this jury's verdict? The verdict is sound unless this Court chooses to overturn a question of fact supported by ample evidence, or chooses to simply state, in a manner that is clearly erroneous, that "no" such evidence exists. The record indicates the truth is to the contrary. (See also Instructions Nos. 12 and 14, where the jury had to find fraud and conduct warranting punitive damages because same were awarded.) (R.4878-80) Instruction No. 8 was given to the jury without objection. (R. 4877-78) In fact, the last sentence was added to same by defense counsel himself! This Instruction makes fraud, fraudulent concealment, and a concurrent tolling of the statute of limitations, a factual issue. With no objection to the presentation of this Instruction to the jury, the jury's finding becomes the "law of the case." The jury had to find the Estate was the beneficiary, to find for the Plaintiff in the first place. See also Instruction No. 12. (R.4878) Hence the insurance company had the affirmative obligation to speak, and by its silence is guilty of fraud and the tolling of the statute of limitations. This Court is substituting its view of the evidence to support the decision reached in its Opinion, in the face of compelling legal and factual precedent that dictates otherwise. Same is improper. *Metropolitan Life Insurance Co. v. Williams*, 197 Ark. 883, 125 S.W.2d 441 (1935).

This Court quotes the Trial Court's "Findings of Fact" on pg. 7 of its Opinion, and states that to prove fraud, the Plaintiff must show:

> Overt acts caused the legal right to be hidden . . . or there existed a specific legal relationship between the parties that obligated an overt disclosure . . .,

and agreed with said analysis. The aforementioned Jury Instruction makes this a closed issue. If the Estate was the beneficiary as the *Defendant itself* told the jury, the insurance company had the affirmative obligation to seek out the Estate, notify the skilled fiduciaries and Trustees at First National Bank, interplead the money to alert the Estate and the attorneys for these minor children, notify the Probate Court of Faulkner County that said proceeds should be payable to the Estate, . . . Doing nothing is fraud. It cannot sit back and wait on an Aunt and Uncle to file a lawsuit. It has an *affirmative obligation to speak.* We don't have to worry about the "legal relationships between the parties." *Camp v. First Federal Savings and Loan*, 12 Ark. App. 156, 71 S.W.2d 213 (1984).

These facts, coupled with the Instructions, coupled with the fact that the insurance company submitted *no* Instruction, whatsoever, even telling the jury it had a statute of limitations defense, effectively prevents the Defendant from raising this issue on Appeal. When a party requests, or acquiesces in, an Instruction submitting particular issues to the jury, that party is not entitled to thereafter complain about the jury,s determination of such an issue. *Farmers Coop Assoc. v. Garrison*, 248 Ark. 948, 454 S.W.2d 644 (1970); *Willis v. Elledge*, 242 Ark. 305, 413 S.W.2d 636 (1967). See also *Rule 51* of the *Arkansas Rules of Civil Procedure.* If a party does not proffer a Jury Instruction embodying and articulating his theory and all defenses, the failure to do so constitutes a waiver. *Dodson Creek. Inc. v. Fred Walter Realty Co.*, 2 Ark. App. 128, 620 S.W.2d 947, 952 (1981). The failure to object to an

Instruction bars a party from raising the applicability of the doctrine espoused in same on Appeal. *Northland Aluminum Products, Inc. v. Creative Cookware. Inc.*, 678 F.2d 746 (1982); *Rowe International, Inc. v. J.B. Enterprises' Inc.*, 647 F.2d 830 (8th Cir. 1991). It doesn't matter that the party moved for a Directed Verdict, or that it wants to hang its hat on the issue being a matter of law. It *has* to object to the Instruction being given to the jury, or said objection is waived. Absent same, the Jury Instruction, the jury's finding, is the law of the case.

(b) NOTICE TO RITA FIELDS AND JACK SMITH

This Court mistakenly states that even if fraud is present, same is somehow cured because two (2) elderly individuals, one an heir of the Estate, and one a possible heir, who may have gotten l/llth of the income off of the interest from these proceeds during their limited lifetime, had knowledge the Estate was the beneficiary of these life insurance policies, and saw financial statements indicating same, prior to the insured's death.

In the first place, it has been the rule of law in Arkansas *for more than a century* that any claim on behalf of the Estate must be brought by the Executor of Administrator of the Estate. *Whelan v. Edwards*, 31 Ark. 723 (1877). The Defendant itself moved for Summary Judgment because the heirs of the Estate were attempting to bring a cause of action to recover these insurance proceeds instead of the Executor. J. Michael Stoltz had to be appointed Special Executor to proceed forward in this lawsuit. Isn't there a clique, somewhere that states what's good for the goose is good for the gander?

The Estate is an entity in and of itself. Only the Executor, or one appointed Special Executor, can receive "Notice" that can bind the Estate. A.C.A. # 28-1-112. The United States Supreme Court has held that any creditor of the Estate must be given specific and actual notice if

their identity is "reasonably ascertainable," and that to take one,s property without providing same violates the due process clause of the Fourteenth Amendment of the United States Constitution. *Tulsa Professional Collection Services, Inc. v. Polk,* 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed. 2d 565 (1988); citing *Mellane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 70 Sup.Ct. 652, 94 L.Ed. 865 (1950) and *Menonite Board of Missouri v. Adams,* 462 U.S. 791, 103 Sup.Ct. 2706, 77 L.Ed.2d 180 (1983).

Taking this one step further, and assuming for purposes of argument that the Aunt and Uncle had notice, which is debatable, and that the Uncle by marriage even had a *claim*, which is *unlikely*, no one, not this Court's law clerks nor opposing counsel, will find a case that holds that notice to an elderly Aunt and Uncle under these circumstances will bind the other children, especially minor children, that make up the Estate. They testified in rebuttal only to counter the Defendant's contention that the deceased's intention was to designate the son as beneficiary and alleged comments by him verifying same prior to death. This evidence was not even presented, as the Opinion would read, in the Defendant's case in chief. Perhaps the Aunt and Uncle cannot receive their share of the income, but that issue should be determined in Probate Court after a thorough trial.

This Court has mistakenly cited an untenable basis for erasing a potential $10 Million Judgment, without citing any case law, precedent, statutory authority, etc. The leading treatise on Estates, *Page on Wills*, 2639, 2642, cites Arkansas cases and states the following when dealing with probate law and an Estate:

> Notice must be served upon the persons who are specified in the statute which regulate notice. The contents of the citation or notice must conform to the requirements of the statute. Without express authority, the entrance of appearance by one heir does not

enter an appearance for another heir. *Id.*, pgs. 87, 88, and 92.

The Arkansas case of *Sowell v. Housman*, 207 Ark. 929, 183 S.W.2d 511 (1944) is cited as being in conformance with the aforementioned, horn book rules of law. See also *Matter of Lacy's Estate,* 126 Cal. Rptr 432, 54 Cal.App. 3rd 172 (1975) and *Hesthagen v. Harby,* 78 Wash.2d 934, 481 P.2d 438 (1971). These cases are not exactly on point, but the analogy is clear. The Estate is an entity that can only be bound by notice, in the statutorily described manner, to the Executor or Administrator.

Furthermore, the Defendant offered no proof on the age of these minor children at all pertinent times, much less whether they were incapacitated or incompetent for some other reason. It had the burden of proof on the issue of limitations; said burden does not shift to the Plaintiff because it is obvious from the record we are dealing with minor children. Notice to a minor, by statute, must go through a Guardian. See A.C.A. § 28-65-101, et seq.

Finally, Lewis Mathis, the attorney for the Friday Firm, berated and ridiculed the balance sheets in question in his testimony as bogus, and said that *everyone* knew the deceased put what he thought his bankers wanted to see on said documents.

In sum and substance, whether or not Rita Fields and Jack Smith used due diligence is a question of fact, judicially recognized as such, for the jury. This Court's fall back position is simply untenable.

This Court's Opinion is directly contrary to long established rules of law pertaining to insurance companies and their obligations to those they deal with. For that reason, same must be gone into in this pleading.

III

GENERAL RULES OF LAW

The law is clear, in every jurisdiction, that in every contract, including a policy of insurance, there is an implied covenant of good faith and fair dealing that neither party will do anything which will injure the right of the other party to receive the benefits of the agreement. *Merritt v. J.A. Stafford Co.*, 440 P.2d 927 (1968); *Couch on Insurance* 2d, § 15:25. Insurance policies are contracts of the utmost good faith and must be administered and performed as such by the insurer. A relationship of trust and confidence between the insurer and insured, as distinguished from the existence of a formal trust, is recognized by Courts and is used by Courts to prohibit the insurance company from practicing fraud or a misrepresentation. *Id.* at § 23:12.

The law is equally clear, and recognized in all jurisdictions, that where fraud is involved the time period within which a beneficiary must sue commences to run only from the date of the discovery of the fraud, or when "the fraud" might with reasonable diligence have been discovered, *Id.* at 75:107. If the person injured:

> remains ignorant for a time, the applicable statute of limitations commences to run only from discovery or the date when, with reasonable diligence, there ought to have been a discovery of the facts constituting the fraud. . . *Id.*

As a matter of simple contract law, the Defendant has failed to discharge its contractual obligations. When the insurer makes payment of the proceeds of insurance to the *rightful beneficiary,* such payment is a discharge of the liability of the insurer. *Id.*, 27:176. However,

> the payment of the proceeds of insurance to the wrong person by an insurer does not relieve it of its liability to the proper beneficiary, whether

> the payment is improper because made to a substituted beneficiary where there was no legally effective change of beneficiary, or because made to the original beneficiary where there had been an effective change of beneficiary. *Id.* at § 27:177.

If the insurer knows of potential adverse claims to the insurance proceeds, and chooses to pay any one of the claimants, it acts under the risk that the recipient selected by it is the one who is lawfully entitled thereto. *Id.* at § 27:178. The rightful beneficiary can sue the wrongful recipient, but this does not relieve the insurer of its liability to the correct beneficiary. *Id.* at § 27:179. *Appleman on Insurance*, 1098, echoes these principles and cites the Arkansas Supreme Court case of *Sovereign Camp. Woodmen of the World v. Israel*, 117 Ark. 121, 173 S.W.2d 855 (1915) in support of same.

If the insured does not know of the existence of the insurance contract, or know that he is a named beneficiary under same, he will not be barred by limitations for failing to pursue a claim within the standard statutory time frame. *Couch on Insurance* 2d. § 75:175. *Thompson v. Equitable Life Assurance Society*, 298 A.2d 422 (1974).

The fact that fraud and fraudulent concealment will toll the applicable statute of limitations on a beneficiary bringing a cause of action on their life insurance policy is spelled out in greater detail at § 75:210.

> Fraud of an insured tolls the limitation on a right of action whether *statutory or contractual*, and the limitation becomes effective only from discovery or from the date when, with reasonable diligence, there ought to have been discovery. (emphasis added) citing *Firemen's Insurance Co. v. Jones*, 245 Ark 179, 431 S.W.2d 728 (1968).
>
> If by any act of concealment or deceit the wrongdoer hides from the innocent party the facts which would

> put him upon inquiry, the contractual limitation or statute does not begin to run.
>
> Fraudulent concealment constitutes an implied exception to the statute of limitations, and a party who wrongfully conceals material facts, and thereby prevents a discovery of his wrong and the fact that a cause of action has accrued against him, is not allowed to take advantage of his own wrong by pleading the statute, the purpose of which is to prevent wrong and fraud.

Perhaps the Arkansas Supreme Court case of *Metropolitan Life Insurance Co. v. Williams*, 197 Ark. 883, 125 S.W.2d 441 (1935) provides us with the best synopsis of Arkansas law in regard to deciding the issues at hand. The fact situation of *Williams* is extremely complicated and convoluted, but suffice it to say that in September of 1923 an insured under a life insurance policy disappeared. The Plaintiff and beneficiaries in *Williams* did not file her lawsuit until September 28, 1931. The insurance company pled limitations as a complete bar, and the Plaintiff alleged fraud and fraudulent concealment against the insurance company to defeat same. The Arkansas Supreme Court stated;

> It is a general rule that where one has deceived another or where, through *active wrong or NEGLIGENCE,* misleads another and causes him not to file suit, the statute is tolled or suspended until it is discovered that the representations were false. If a Defendant intentionally *or NEGLIGENTLY* misleads a Plaintiff by his representations and causes him to delay until the statutory bar has fallen, the Defendant will be estopped from pleading the statute of limitations. (emphasis added) *Id.* at 448.

Cases too numerous to cite stand for the proposition that an insurance policy is governed by contract law. The

Court of Appeals in *Rice v. McKinley*, 267 Ark. 659, 590 S.W.2d 305 (1979) provides us with further insight on exceptions to a strict enforcement of a statute of limitations to bar a Plaintiff,s Complaint. In *Rice*, a contract was entered into between the parties in February of 1968. A suit was filed by the Plaintiff on January 28, 1976, and the Defendant raised the statute of limitations and laches as a defense. The Court of Appeals held:

> The error of Appellant's position is that the period of limitations runs from the point at which the cause of action accrues rather from the date of the agreement. . .
>
> Where the parties have entered into an agreement which requires a series of mutual acts, some unilateral, some bilateral in character and have left the time of those acts open ended, and where one contrives to receive the benefits of the agreement . . .the cause of action does not accrue until one party has by word or conduct indicated to the other a repudiation of the agreement. . . ..
>
> If a right of action depends upon some contingency or a condition precedent, the cause of action does not accrue and the statute of limitations does not begin to run until that contingency occurs or the condition precent is complied with. *Id.* at 307-308.

The recent case of *Chadwell v. E.T. Pannell*, 27 Ark App. 590, 776 S.W.2d 38 (1989) echoes these principles and cites *Rice, supra*, as pursuasive authority. The Court in *Chadwell* furthermore stated that the statute of limitations is *not* favored by the law. Under circumstances similar to those that existed in *Rice*. the Court held that:

> Under these circumstances, *the date the limitations began to run is a question of fact*. Where a question of fact remains to be solved, the granting of summary

judgment is inappropriate. . . *Id.* at 41. (emphasis added)

In *Bowler v. Fidelity & Casualty Company of New York,* 250 A.2d 580 (N.J. 1969), the Supreme Court of New Jersey reversed a lower Court's ruling that a Claimant's right to pursue insurance benefits was barred by the applicable statute of limitations. The insurance company had failed to make payments due the insured under a policy of insurance, and, *through its silence.* had induced the insured not to file a lawsuit within the applicable statute of limitations. The quoted pertinent parts of the Court,s decision read as follows:

> [An insurance company's] position requires the assumption of a stern obligation toward people who purchase their contracts. Simply described the obligations is that of fair dealing. . .Insurance policies are contracts of the utmost good faith and must be administered and performed as such by the insurer. Good faith demands that the insurer deal with laymen as laymen and not as experts in the subtleties of law and underwriting . . . There is an implied covenant of good faith and fair dealing that the insurer will not do anything to injure the right of its policy holder to receive the benefits of its contract. This covenant goes deeper than the mere surface of the writing. When a loss occurs which because of its expertise the insurer knows or should know is within the coverage, and the dealings between the parties reasonably put the company on notice that the insured relies upon its integrity, fairness and honesty of purpose, and expects his right to payment to be considered, the obligation to deal with him takes on the highest burden of good faith. (cases cited)
>
> *In situations where . . . the uninformed insured might be inclined to be quiescent about the disregard of nonpayment of his claim and not to press it in timely*

fashion, the company cannot ignore its obligation. It cannot hide behind the insured's ignorance of the law; it cannot conceal its liability. In these circumstances it has the duty to speak and disclose, and to act in accordance with its contractual undertaking. The slightest evidence of deception or overreaching will bar reliance upon time limitations for prosecution of the claim. (emphasis added)

More specifically, in a situation such as that present here, *if all or part of the benefits provided by the policy clearly is due, the insurer must make the payment. If it fails to do so. and the statute of limitations or a policy limitation intervenes before suit is started, it will be estopped to plead the limitation in avoidance of a trial on the merits of the claim.* Further, if the insurer has factual information in its possession substantially supporting the policyholder's right to benefits, but it has a reasonable doubt as to whether the evidence is sufficient to require payment, *the obligation to exercise good faith*, upon which it knows or should know the insured is relying, *cannot be satisfied by silence or in action. It must notify the insured of its decision not to pay his claim.* But mere naked rejection would not be sufficient. The giving of such notice should be accompanied by a full and fair statement of the reasons for its decision not to pay the benefits, and by a clear statement that if the insured wishes to enforce his claim *it will be necessary for him to obtain the services of an attorney and institute a court action within the appropriate time. The "appropriate time" means the time remaining under the policy or the applicable statute of limitations within which the suit must be brought. Failure on the insurer's part to follow such a course. will bar reliance on the statute of limitations or a time restriction on court action expressed in the policy.*

Failure to make this payment constitutes conduct incompatible with the insurer,s obligation to exercise good faith in dealing with its insured, and *of itself* creates an *equitable estoppel* against the plea of the statute of *limitations*. (emphasis the Court's)

We regard the company,s cessation of payments and its unexplained avoidance of its contractual obligation as so inequitable and unconscionable as to bar reliance upon the statutory limitation on the institution of suit on the policy. *Such conduct cannot be permitted to support a technical defense which would avoid a decision on the merits. enforce a forfeiture and bestow on the carrier a shockingly unfair advantage.* (cases cited)

When claims are honestly made *care should be taken to prevent technical forfeitures such as would ensue from an unreasonable enforcement of a rule of procedure unrelated to the merits. Under the circumstances it would be a perversion of the policy of the statute of limitation to deny a trial on the merits.*

There is no need to make fine distinctions as to the persons who owe a duty to disclose. It is likewise unnecessary to dwell upon the contention that the insurer's duty of good faith to its insured arises at the time of contracting and persists throughout the period when premiums are paid and no return is sought, but that when a loss occurs and the insured seeks to obtain the compensation provided in the contract, the parties deal at arm,s length. *It is sufficient to hold that the equitable considerations that justify relief in this case are applicable whether defendant violated a legal duty in failing to disclose its intention to set up this technical defense, or whether it is now merely seeking the aid of a court in sustaining a plea that would enable it to obtain an unconscionable advantage and enforce a forfeiture.* (emphasis added)

> Although none of the cases cited immediately above involved precisely the issue presented here, in our view all of them point in the direction of the result we consider just. It would be a reproach to the law if there were no means of avoiding the unjust result the company seeks to impose upon the insured. *Id.* at 587-90.

Courts have gone to extraordinary lengths to prevent a party from preventing the trial of a cause on the merits by invoking the statute of limitations, when the party seeking to invoke the defense had a superior means of acquiring knowledge relative to the contract, and the mechanics behind which said contract was to be enforced. *W.V. Pangborn v. N.J. Dot*, 552 A.2d 222 (N.J. 1989).

The case of *Davis v. Blue Cross of Northern California*, 600 P.2d 1060 (1979) is discussed at length in *Sarchett v. Blue Shield of California*, 729 P.2d 267 (1987) and provides a useful precedent for the Court in the case at bar:

> The insurer's implied duty of good faith and fair dealing includes a responsibility to inform its insureds of their rights under the policies. . .Failure to inform its insureds of the policies . . . provisions amounted to an *implied misrepresentation.* (emphasis the Court's)
>
> *Blue Cross* ignores the special nature of the insurer-insured relationship and the resultant duties which an insurer owes to its insureds. (cases cited) Among those duties, we stated, is the duty of each contracting party to refrain from doing anything to injure the right of the other to receive the benefits of the agreement. Thus, [the insurer] . . . must give at least as much consideration to the [insured's] interest as it does to its own. One important facet of the insurer's obligation to give the insured's interest as much consideration . . .as it does. . .its own is the duty reasonably to inform an insured of the insured's rights and obligations under the insurance policy. *In particular, in*

> *situations in which an insured's lack of knowledge may potentially result in a loss of benefits or a forfeiture of rights, an insurer has been required to bring to the insured' attention relevant information so as to enable the insured to take action to secure rights afforded by the policy.*
>
> *The duty of good faith does not permit the insurer passively to assume that its insured is aware of his rights under the policy. The insurer must instead take affirmative steps to make sure that the insured is informed of his remedial rights.* (emphasis added) *Id.* at 276-77.

Arkansas recognizes the first party tort of bad faith, *Aetna Casualty & Surety Co. v. Broadway Arms,* 281 Ark. 128, 664 S.W.2d 463 (1984). However, even jurisdictions which do not hold that an insured has a cause of action for bad faith recognize that there is an "implied covenant of good faith" in every insurance contract that is "the essence of what the insured has bargained and paid for, and the insurer has the obligation to perform them. *Beck v. Farmers Insurance Exchange,* 701 P.2d 795, 801 (Ut. 1985). Whether or not an insurance company has fulfilled this duty and obligation is *a question of fact for a jury. Id.*

The Supreme Court of the State of Tennessee has held that an insurance company's obligation under the contract to deal "fairly and in good faith" goes beyond only those duties "specifically spelled out in the contract drawn by the insurer." *MFA Mutual Insurance Company v. Flint,* 574.S.W.2d 718, 720 (Tn. 1978).

Federal Courts interpreting Arkansas law have held that an insurance company must exercise "reasonable care" when determining whether to pay a claim, to whom, and for what amount. Whether reasonable care was exercised is *always* a question of fact for the jury. *McChristian v.*

State Farm Mutual Automobile Ins. Co., 304 F. Supp. 748 (W.D. Ark. 1969)

Thus, as this Court can see, insurance companies do have a duty to pay the proceeds to the proper party, and to apprise any beneficiary of their *potential* rights, and offer an explanation to said beneficiary when the insurance company is unsure whether it owes an obligation or not and fails to pay said obligation. The case at bar is not the first time the situation has arisen, and Courts have uniformly held that the insurance company cannot rely upon a procedural defense to bar a trial on the merits, when the potential Plaintiff failed to pursue a cause of action within the applicable statute of limitations period because of the insurance company's *silence*.

III

ERRONEOUS STATEMENTS CONTAINED IN THE SUPREME COURT'S OPINION

Finally, the following specifics are advanced in further support of the Appellee's view the record in these proceedings was not read carefully.

> Supreme Court Opinion: Mr. Horn concluded. . .that Steve Stoltz was the 'legal' beneficiary and [concluded in an] executive meeting with FPL approximately one week later. . .that paying the son 'without interpleader' was 'the best course.' (See Opinion pg. 3)

Facts: Mr. Horn told the insurance company to interplead the money, that this was the *safest* course to take, that this would *alert* the Estate to its potential claim, that the Estate had a potential claim, and that interpleading the money would expose the insurance company to a suit from the loser. The "executive meeting" to which this Court refers occurred the *SAME DAY* (not a week later) as the Memo from Mr. Horn telling his client to interplead the

money. The words "legal beneficiary" and "the best course" are contained in Defendant's Exh. 20, or the handwritten Memorandum dated the same day and directly contradictory to Mr. Horn's Memo, *from an individual in the Claims Department of the Defendant.* The fact that the Memo from Mr. Horn, and this bogus Memo from the insurance company are dated the same day, and also contradictory, was adequately pressed at the trial of this matter and show the subtleties from which fraud may be inferred. All third parties testified that had they known that neither the Estate nor Steve Stoltz knew of the discrepancies in the beneficiary, they would have notified him of this because that was "the only honest thing to do."

> The Court's Opinion: This dispute with the IRS arose because of a [gift tax] provision, if a gift is made within three (3) years of the decedent's death. (See Opinion pg. 3)

Facts: The IRS agent investigating this matter told the Friday Firm that, although the money was paid to the son, there was and is a valid issue regarding whether or not the Estate is the proper beneficiary, and noted the fact that the Estate,s attorneys, *who were also representing the insurance company itself at that time,* whited out portions of the file and sent it to the IRS.

> The Court's Opinion: In 1983, the attorneys who represented both the Estate and Steve Stoltz requested [the files and they were readily turned over.] 'In all probability' these files would have been turned over to the Estate upon like inquiry. (See Court's Opinion pg. 8)

Facts: The attorneys representing the Estate got the files in 1983, *when they were also representing the Defendant insurance company* itself. Surely, it does not seem ironic to this Court that the attorneys representing the insurance company would have open access to its client's own files, and *said attorneys would protect its client.* In contrast,

the attorneys representing the undersigned's clients filed discovery, and had to have a Court Order to compel the Defendant and the Friday Firm to turn over the material from the insurance company's files to him. On top of speculating to supply facts to support its opinion if the true interaction could not be ascertained, we have an example *in the record* that shows this Court's supposition is wrong.

> The Court's Opinion: In response, First Pyramid denies concealment and asserts the Estate knew or should have known of the change in beneficiaries on the policies. (See Court's Opinion pg. 5)

Query: The undersigned cannot ascertain what this Court means by this statement, as same, except for "denies concealment," has no connection to any position raised by either party on Appeal.

Finally, this Court cites *Atlanta Exploration, Inc. v. Ethyl Corporation*, 301 Ark. 331, 784 S.W.2d 150 (1991) as one of the few cases in its ruling to support its opinion that you must have affirmative and fraudulent acts of concealment. A reading of this case makes it clear that this Court found that said finding is a *question of fact for the jury*.

CONCLUSION

Writing this Brief is a sad day for the undersigned. It is sad because he has to address this Honorable Court in this manner. He has held this Court in the highest esteem, and took an oath before this Court that he takes very seriously. The first thing some people do when they lose is manufacture excuses and shout "sour grapes." Such is not the case here. The undersigned is not a radical or a renegade. He wakes up each morning with both feet on the ground, and has lost cases before he thought he should have won when there were legitimate issues present. Such is not the case here either.

The Appellee won this case before the jury. Every "issue of fact" this Court chooses to change or ignore was presented to the jury. The jury was properly instructed, or, in the alternative, no objections were raised which merit any discussion in this Petition and Brief. The undersigned beat the Appellant at every turn; here buffed every argument, legitimately, factually, and according to the law.

There is substantial evidence to support fraud. It was made a jury question by the Defendant. It is the law of the case. This Court cannot read the Abstract of the Testimony provided as Exh. A to the *Brief in Support of Motion For Vacatur, To Disqualify And, In The Alternative, To Appoint A Special Master, And Motion For Extension Of Time To File Petition For Rehearing,* and state otherwise.

According to this Court's decision, an insurance company within this State can pay whomever it chooses, or pay no one at all, take no affirmative action whatsoever to alert the rightful beneficiary, wait five years, and be home free. We must all check the obituaries for the preceding five years, and stay "up to date" on deaths from this day forward, in order to make sure we send inquiries to all insurance companies who have paid benefits asking if those benefits really belonged to us. Is that what this Court wants to tell the People of Arkansas? The Appellee, and those he stands for, feel like the families of the victims wronged by the individuals recently set free by acting Governor Jerry Jewell, who acted in spite of the decisions of those respective juries.

The Appellee is asking this Court to have the courage to admit they made a mistake and right the wrong. We have lived by the jury system in this country for years, and this Court's verdict simply states that the decisions of a jury within this State carry no weight whatsoever.

In sum and substance, while the Appellee could see how an adversary, who carries the torch for his client, could

argue in good faith that a factual question *for the jury* is present on the issues pertinent to these proceedings, there is absolutely no way anyone can read the record, view same in the light most favorable to the Appellee, and state the evidence at trial is so one-sided the jury,s verdict, and concurrent findings of fact, can be overturned.

Respectfully submitted,
DAVIDSON LAW FIRM, LTD.
P.O. Box 1300
Little Rock, Arkansas 72203-1300
(501) 374-9977

By: s/s Charles Phillip Boyd, Jr.
Charles Phillip Boyd, Jr.
Bar No. 82023

CERTIFICATE OF SERVICE

I, Charles Phillip Boyd, Jr., do hereby certify that the above and foregoing has been mailed by ordinary mail with sufficient postage affixed thereon, on this the 22nd day of January, 1993, to:

Peter G. Kumpe
Williams & Anderson
400 Rogers Building
111 Center Street
Little Rock, AR 72201

s/s Charles Phillip Boyd, Jr.
Charles Phillip Boyd, Jr.

APPENDIX 4

SUPREME COURT OF ARKANSAS

No. 92-4

FIRST PYRAMID LIFE INSURANCE COMPANY OF AMERICA,

APPELLANT

V.

J. MICHAEL STOLTZ, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF J.P. STOLTZ, DECEASED,

APPELLEE

Opinion Delivered FEB 15 1993

APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, NO. 89-2464.
HON. CHRIS PIAZZA, JUDGE

CONCURRING OPINION.

JACK HOLT, JR., Chief Justice

The appellee, Estate of J.P. Stoltz (hereafter "the Estate"), has filed a petition for rehearing requesting that this court vacate its decision of December 21, 1992, reversing a jury verdict in the Estate's favor. In addition, the appellee has filed a separate motion for "vacatur" praying that all members of this court who participated in this case disqualify themselves from rendering any further decision on the merits of this case and that seven special justices be appointed. The court treated this motion as a Letter of Suggestion of Disqualification, Ark. Sup. Ct. R. 27, since our rules do not provide for a motion for vacatur.

The Estate's Motion for Vacatur is premised upon allegations that I have a social relationship with Mr. Herschel Friday of the Law Firm of Friday, Eldredge & Clark that renders my decision making in this case impaired because of this relationship, that all members of this court should disqualify.The determinative issue in this case is whether the appellee, Estate of J.P. Stoltz, has proven fraudulent concealment on the part of First Pyramid Life Insurance Company in order to toll the statute of limitations on the Estate's claim. In an unanimous decision, the other justices were in agreement that the Estate had not proven fraudulent concealment and that the Estate was not entitled to a judgment in its favor. Neither Mr. Friday nor members of the Friday, Eldredge and Clark firm were parties or counsel to the litigation in question, nor served as attorneys at trial or during this appeal.

No one outside of this court has discussed this case with me during its pendency on appeal. My relationship with Mr. Friday is of no moment. It does not impair my decision making processes in this case. For these reasons, I decline the appellee's suggestion that I disqualify.

APPENDIX 5

IN THE ARKANSAS SUPREME COURT

NO. 92-4

FIRST PYRAMID LIFE INSURANCE COMPANY OF AMERICA; USABLE INSURANCE COMPANY

APPELLANTS

VS.

J. MICHAEL STOLTZ, As Special Administrator of the Estate of J.P. Stoltz, Deceased

APPELLEE

MOTION FOR RECONSIDERATION

Comes J. Michael Stoltz, As Special Administrator of the Estate of J.P. Stoltz, Deceased, and for his Motion does state as follows:

1. This Court rendered an Opinion on February 15, 1993 denying the Estate's Motion for Vacatur, To Disqualify And, In The Alternative, To Appoint A Special Master. If the Court refused to disqualify itself, the Estate requested the appointment of a Special Master to investigate the extent of what is believed to be a close personal friendship between Chief Justice Jack Holt, Jr. and Herschel Friday of the Friday Law Firm, exemplified by Judge Holt being the personal and specific guest of Mr. Friday's on numerous occasions through the years at social outings and functions, including the period of time this matter was pending on Appeal.

2. The Court's Opinion erroneously states that the fact that Judge Holt and Mr. Friday have a "social relationship" is the only basis for his disqualification, and the disqualification of the other members of this Court. The

basis for the Motion to Disqualify is *not* simply that a "social relationship" exists between Mr. Friday and Judge Holt. It is believed that Judge Holt is a regular *guest* of Mr. Friday's on his farm, which is in essence a private hunting resort, in Mayflower, Arkansas, and that other hunting excursions between these individuals transpired while this matter was on Appeal. The Friday Law Firm had a substantial interest in this Court's overturning the jury verdict that had been rendered in these proceedings. By analogy and example, Judge Holt being a regular guest of Mr. Friday on his farm, where pen raised quail are hunted, complete with a hunting lodge that is said to be elaborate and eloquent, is no different than Judge Holt being a routine and regular guest of Mr. Friday's at a ski resort owned by Mr. Friday in Boulder, Colorado, and then Judge Holt writing an Opinion that the Friday Law Firm believes helps exonerate it from further exposure to the Estate in future litigation that is imminent.

3. The Supreme Court's Concurring Opinion does not discuss, much less distinguish, *Johnson v. Sturdivant*, 295 Ark. 622, S.W.2d 415 (1988), nor tell the attorneys and people of the State of Arkansas why the standards laid down by that case applied to Judge John Purtle, but not to Judge Holt.

4. This Court's "Concurring Opinion" states as a basis for the refusal to disqualify that "neither Mr. Friday nor members of the Friday, Eldredge & Clark firm are parties or counsel to the litigation in question, nor served as attorneys at trial or during this Appeal." Said statement ignores, and is directly contrary to, the specific law laid down by the U.S. Supreme Court which states in unequivocable fashion that recusal due to a conflict is not limited to *the parties named in the suit*, or the attorneys representing said parties. *Lilejeberg v. Health Services Acquisition Corporation*, 486 U.S. 847, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988) and *Preston v. U.S.*, 923 F.2d 731 (9th Cir. 1991).

4. The "Concurring Opinion" states that the crux of the issue on Appeal is whether or not fraudulent concealment tolling the statute of limitations had been proven by the Estate is the dispositive issue. This statement indicates to the Estate that this Court has again refused to look at the true issues inherent in this Appeal, or matters raised in the post-Opinion pleadings unequivocably indicating that the "law of this case," as codified in Jury Instruction No. 8 (R.4877-78), given without objection, is that First Pyramid is guilty of fraud which tolled the statute of limitations because the Estate was determined to be the proper beneficiary of the life insurance policies and First Pyramid failed to apprise the Estate of its claim. While the entire record, if reviewed, would indicate that numerous other facts and factors representing fraud are present, no such inquiry is necessary.

5. Judge Holt's statement that no one outside the Court has specifically discussed this matter with him during its pendency on Appeal ignores the legal standard required for recusal. There need be no allegations, or proof, that this case was actually and specifically discussed by other members, specifically Mr. Friday, with Judge Holt. The fact that not only do they have a close personal friendship, but that Judge Holt is a *guest* at Mr. Friday's private hunting resort, and on hunting excursions outside the State of Arkansas, and will undoubtedly continue to be a guest on a regular but intermittent basis in the future, is enough to cause a reasonable man to question Judge Holt's impartiality. That is the standard, not whether or not specific discussions of this case took place. 415 (1988) dictates that the remaining members of this Court disqualify, and that seven (7) special Justices be appointed to hear this matter on its merits.

6. The failure of this Court to appoint a Special Master to investigate the full extent of the personal friendship between Judge Holt and Mr. Friday, and the number of times Judge Holt has been the personal *guest* of Mr. Fri-

day's on his private land, or on out of state leases, to partake in an important recreational activity, amounts to Judge Holt sitting in judgment on himself with no denial that such is the true situation, much less an explanation for why same is not grounds for disqualification. This situation inherently raises the issue which mandated the entire Court's recusal, and articulated in *Johnson v. Sturdivant*, 295 Ark. 622, 758 S.W.2d 415, 416 (1988) as follows: "It is not easy to sit in Judgment of one's self." These events amount to a violation of the 14th Amendment to the United States Constitution, a denial of due process for the Estate, and causes one to seriously question the Estate's ability to receive a fair hearing in these proceedings.

7. Attached hereto as Exh. A is an Affidavit in accordance with Rule 3 of the Rules of the Supreme Court.

WHEREFORE, the Estate respectfully prays that this Court reconsider its "Concurring Opinion," and its refusal to disqualify itself, that this Court not render any additional Opinions pending the outcome of a judicial inquiry by the Arkansas Judicial Discipline & Disability Commission, and for all other relief to which it is justifiably entitled.

Respectfully submitted,

DAVIDSON LAW FIRM, LTD.
P.O. Box 1300
Little Rock, Arkansas 72203-1300
Telephone (501) 374-9977

By: s/s Charles Phillip Boyd, Jr.
Charles Phillip Boyd, Jr.
Bar No. 82023

CERTIFICATE OF SERVICE

I, Charles Phillip Boyd, Jr., do hereby certify that the above and foregoing has been mailed by ordinary mail with

sufficient postage affixed thereon, on this the 18th day of February, 1993, to:

Peter G. Kumpe
Williams & Anderson
400 Rogers Building
111 Center Street
Little Rock, AR 72201

s/s Charles Phillip Boyd, Jr.
Charles Phillip Boyd, Jr.

APPENDIX 6

AFFIDAVIT

Comes the undersigned and does hereby solemnly state under oath the following facts and information are true and correct to the best of my knowledge and belief:

1. I am one of the attorneys of record for the Appellee in these proceedings.

2. I represent six (6) heirs and/or beneficiaries of the Estate of James Patrick Stoltz. My contact client, Mike Stoltz, contacted me around Christmas, 1992, after this opinion was delivered, and informed me that he had heard of quail hunting trips taken to Herschel Friday's farm by Jack Holt, Jr., Chief Justice of the Arkansas Supreme Court, and trips to leased land in the State of Texas. These trips supposedly occurred intermittently, but on a repetitive basis, through the years.

3. The last paragraph of the letter form Mike Stoltz requested, in no uncertain terms, that I "investigate these rumors immediately and see if there is any validity to them notify [him] of [his] legal options.

4. I have investigated this matter by various means, including, but not limited to, a direct conversation with Mr. Herschel Friday, and have been apprised that Chief Justice Jack Holt, Jr. and Herschel Friday have "kept up with each other through the years," and have hunted together in Texas on leased lands, and on Herschel Friday's farm in Mayflower, Arkansas. I have furthermore been apprised that the Honorable Chief Justice Jack Holt, Jr. has hunted in Mayflower with Mr. Friday's son. These quail hunting excursions have been intermittent, but repetitive, through the years and include at least one occasion during the "quail" season of 1992-93.

5. I have been apprised through my dealings with members of the Friday Law Firm that they believe, although

I disagree with same, that the Opinion in this Court helps insulate them from any further exposure in these proceedings based on the statute of limitations. I make *no* assertions, or insinuations, that the decision of this Court and the opinion of the Friday Firm in this regard are anything other than circumstantial; I am merely stating under oath what has been related to me to show the Friday Firm has made statements that it believes it is an interested party.

6. I have counseled with other attorneys whom I hold in the highest esteem, and have been told that, based on my client's letter alone, I have no choice but to bring this matter to this Court's attention.

s/s Charles Phillip Boyd, Jr.
CHARLES PHILLIP BOYD, JR.

VERIFICATION

I, Charles Phillip Boyd, Jr., the undersigned, do hereby state under oath that the statements set forth hereinabove are true and correct to the best of my information, knowledge and belief.

s/s Charles Phillip Boyd, Jr.
CHARLES PHILLIP BOYD, JR.

SUBSCRIBED AND SWORN TO before me a Notary Public, on this the 19th day of January 1993.

s/s Edwina K. Bell
NOTARY PUBLIC

My Commission Expires:

12-1-95

APPENDIX 7

Case	Party Represented by Friday Firm	Outcome	Effect on Friday Firm
Rich Mountain Elec. Coop. v. Revels, 311 Ark. 1, 841 S.W.2d 151 (1992)	Appellant	Aff'd	–
Union National Bank v. Barnhart, 308 Ark. 190, 823 S.W.2d 878 (1992)	Appellant	Aff'd	–
Ross v. Patterson, 307 Ark. 68, 817 S.W.2d 418 (1991)	Appellant	Rev'd/ Dism'd	+
Travis v. Houk, 307 Ark. 84, 817 S.W.2d 207 (1991)	Appellee	Rev'd/ Rem	–
Register v. Oaklawn Jockey Club, Inc., 306 Ark. 491, 811 S.W.2d 315 (1991)	Appellee	Rev'd/ Rem	–
Blankenship v. Burnett, 304 Ark. 469, 803 S.W.2d 539 (1991)	Appellee	Aff'd	+
Barnett v. Arkansas Transport Co., 303 Ark. 491, 798 S.W.2d 79 (1990)	Appellee	Aff'd	+
Allstate Ins. Co. v. Redman Homes, Inc., 302 Ark. 335, 789 S.W.2d 454 (1990)	Appellee	Rev'd/ Rem	–
CDI Contractors, Inc. v. Goff Steel Erectors, Inc., 301 Ark. 311, 783 S.W.2d 846 (1990)	Appellant	Aff'd	–
McCollough v. Lessenberry, 300 Ark. 426, 780 S.W.2d 9 (1989)	Appellant	Rev'd/ Rem	+

Moore v. Missouri Pacific R.R., 299 Ark. 232, 773 S.W.2d 78 (1989)	Appellee	Rev'd/ Rem	–
Ragland v. General Tire & Rubber Co., 297 Ark. 394, 763 S.W.2d 70 (1989)	Appellee	Rev'd/ Rem	–
Carton v. Missouri Pac. R.R., 295 Ark. 126, 747 S.W.2d 93 (1988) (reh'g denied, April 25, 1988)	Appellee	Rev'd/ Rem	–
Gipson v. Brown, 295 Ark. 371, 749 S.W.2d 297 (1988)	Appellant	Case Dism'd	+
Butler Mfg. Co. v. Hughes, 292 Ark. 198, 729 S.W.2d 142 (1987), *supplemental opinion reh'g denied*, 292 Ark. 206-A, 731 S.W.2d 214 (1987)	Appellant	Aff'd	–
Howard v. Wood Mfg. Co., 291 Ark 1, 722 S.W.2d 265 (1987)	Appellee	Appeal Dism'd	+
First State Bank v. Twin City Bank, 290 Ark. 399, 720 S.W.2d 295 (1986)	Appellee	Rev'd/ Rem	–
Gipson v. Brown, 288 Ark. 422, 706 S.W.2d 369 (1986)	Appellant	Rem	+

No. 93-128

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

J. MICHAEL STOLTZ, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF J.P. STOLTZ, DECEASED,

Petitioner,

vs.

FIRST PYRAMID LIFE INSURANCE COMPANY OF AMERICA, *et al.*,

Respondents.

Petition for Writ of Certiorari to the Arkansas Supreme Court

REPLY BRIEF FOR PETITIONER

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I.

THE CONSTITUTIONAL VIOLATION OF PETITIONER'S RIGHT TO DUE PROCESS WAS TIMELY FILED.

Respondent insinuates that Petitioner has not timely raised a violation of his right to due process, and cites what it purports to be the only example of same having been raised in support of its position. The Respondent is not being forthright with this Court. The Petitioner raised this issue numerous times before the Arkansas Supreme Court: (a) in the *Brief in Support of Motion for Vacatur, et al.*, filed on January 19, 1993; (b) *Petition and Brief for Rehearing*, filed on January 22, 1993; (c) *Reply to Appellants' Brief in Response to Motion for Vacatur, et al.* filed on or about February 4, 1993; (d) *Motion for Reconsideration* filed on or about February 18, 1993; and (e) *Motion for Stay* filed on or about February 18, 1993. A Petition for Writ of Certiorari should be as short and concise as possible. The Petitioner did not include in his abstract every pleading in which the due process violations were raised. However, a review of the Petitioner's Appendix at 14a, 21a, and 26a, and the Respondent's Appendix at 42a, clearly shows that this argument was adequately raised and presented vigorously.

II.

THE FACTS SUPPORTING THE APPEARANCE OF AN IMPROPRIETY WERE ADEQUATELY PRESENTED THROUGH THE BEST MEANS AVAILABLE, AND WILL ULTIMATELY BE INDEPENDENTLY VERIFIED.

Counsel for the Respondent next calls counsel for the Petitioner a liar and a coward, indicating that Petitioner's counsel "hid" behind a letter "purportedly" authored by his client, and insinuating that same was actually written by him because it contains the same "typeset" as the *Motion for Vacatur, et al.* These

accusations are totally false, and Petitioner's counsel resents same. As soon as this issue surfaced, Petitioner naturally picked up the phone and called his attorney. As one might expect, an intensive investigation into the facts, and legal research into the applicable law, ensued. It was after the initial shock that Petitioner placed his position in a letter and forwarded same to his counsel. The letter, and prior conversations between Petitioner's counsel and the Petitioner, compelled Petitioner's counsel to investigate same, and compelled the call for public disclosure.

Petitioner's counsel spoke to Herschel Friday, who himself admitted that the Chief Justice had quail hunted on his private land, as a private guest, immediately prior to the rendition of the Opinion overturning this jury verdict. Furthermore, Mr. Friday impliedly admitted upon direct questioning that he had hunted with the Chief Justice immediately after Christmas, 1992 in the State of Texas on privately leased lands. These activities were not part of a group, attendance of a church or civic club with numerous other individuals, etc. They are not part of an accepted and public casual "friendship by general association" that does not mandate recusal or disclosure. They were private, exclusive outings. (*See* Respondent's Appendix 6, page 44a).

Furthermore, Mr. Walter E. Simpson, former Chief of Police of Little Rock, Arkansas, and William R. Wilson, Jr., former President of the Arkansas Bar Association, were hunting in the same area in Texas as Mr. Friday and Judge Holt during the Christmas weekend of 1992. Both of these individuals are aware that Mr. Friday and Judge Holt left the motel for the stated purpose of hunting together on Mr. Friday's hunting lease. This weekend was during the period in which a Petition for Rehearing could be filed in the Supreme Court of Arkansas (as it was). One would be naive to believe that the extent of these social excursions stop and start on the two occasions where eyewitnesses have placed these two individuals together within a week's period of time.

This issue was not raised until after the Opinion in question

was rendered because both excursions not only came to light, *but actually occurred* within a week of the date of said Opinion. How could same have been raised earlier? Does the necessary burden belong to a party to somehow know beforehand about events that should not take place, and should be disclosed in the event they occur by happenstance?

At the very same time Petitioner's counsel is apprised of these facts, he is negotiating with William H. Sutton of the Friday Law Firm in an attempt to settle litigation that was imminent against said firm, and was apprised that said firm is of the opinion that the December 21, 1993 Opinion authored by the Chief Justice insulated it from any exposure or liability to the Estate. These facts were summed up in an Affidavit signed by Petitioner's counsel. (*See* Respondent's Appendix 6, page 44a). What else could be done at that point?

The Respondent asserts that there is no "evidence", nor any "record," that private hunting excursions have occurred during the years between the Chief Justice and Mr. Friday, much less that said excursions occurred while this matter was actually pending on appeal. In fact, Respondent insinuates in footnote 1 on page 12 of their Brief in Opposition that were such evidence present, same would be improper. Petitioner's quandary was simple: How does one make a record of such activities with no subpoena power, no right to take depositions in an appellate setting, and no right to force the Chief Justice of the Arkansas Supreme Court, nor the senior partner of the largest law firm in the State, to voluntarily, unequivocally, and unilaterally disclose the true facts? Lawyers with cases pending before the Arkansas Supreme Court are loathe to sign affidavits which could detrimentally impact their lives and careers, even when they are totally innocent in the manner they acquire said information, and impart same.

The Respondent characterizes the Petitioner's "assertions" as "scandalous and libelous." It is black letter law that the truth is a

defense to any such assertions/causes of action. The aforementioned excursions, while this matter was pending on appeal, are concrete. They will ultimately be documented in the investigation being conducted by the Arkansas Judicial Discipline and Disability Commission. The problem for Petitioner is that the Chief Justice refused to verify same, and the Arkansas Supreme Court refused to issue a stay until same could be independently verified. Petitioner states in good conscience that he has heard, and believes, the extent and depth of the relationship is much more; however, he had unequivocable evidence verifying the excursions at the crucial time when the Opinion in this matter was written, and believes that the exclusive social excursions he can verify mandated recusal, or, at the least, a disclosure. Petitioner's counsel has not taken the cowardly approach; to the contrary, he has stood up for this client at great risk to himself, personally and professionally.

III.

THE IMPACT OF "REMOVING THIS CLOUD" ON OTHER CASES SHOULD BE OF NO MOMENT TO THIS COURT.

The Respondent states in its Brief that if this Court were to hold the above-referenced socializing between the author of an Opinion and an interested party while the matter was pending on Appeal was improper, that same would wreak havoc on the entrenched legal system in the state of Arkansas. "Pandora's box would be opened, and its evils loosened, never to be captured again." (*See* page 11 of Respondents' Brief in Opposition). It is incredulous to Petitioner that the issue would be couched in these terms. The solution to the problem is for the Chief Justice of the State of Arkansas to recognize that there are accepted tradeoffs to occupying that position. Whether or not any cases have to be "reopened" in order to remove a cloud which may be lingering over them if improper social interaction took place should not factor into this Court's decision at all. The issue is what is right and what

is wrong, and who is willing to stand up for it.

IV.

PETITIONER'S CLAIM AGAINST THE FRIDAY FIRM WAS NOT PREDICATED UPON A REVERSAL OF THE JURY VERDICT.

The Respondent states on page 14 of its Brief in Opposition: "By reversing, the door was opened for Petitioner to make a claim against the Friday Firm. Had the Judgment been affirmed, Petitioner would not have had a claim against that firm." In the first place, in circumstances such as those present in the case at bar, the impact of a decision on an interested party is not something one looks at *on the back end.* In the second place, such a statement is absolutely, totally false.

The Complaint the Estate has filed against the Friday Firm alleges numerous acts of negligence, mismanagement, failure to disclose conflicts of interest, etc. perpetrated by that firm against the Estate over a ten-year period. The controversy involving the insurance company is a significant part of the controversy, but it is by *no* means the sum total of same. The Complaint incorporates numerous allegations of improprieties, including, by reference, a sister Complaint filed in Faulkner County Probate Court that is 63 pages long, with 65 exhibits attached to same, all of which involve and entail the improprieties the Friday Firm is alleged to have committed.

Conversely, it goes without saying that had the Arkansas Supreme Court affirmed the verdict the Estate had obtained against the Respondent, thereby conclusively establishing that the Estate was the contractually designated beneficiary of the insurance policy in question, and that the Friday Firm had knowledge of same through its review of the files of its other client, *i.e.*, the Respondent, then the Estate would have been able to possibly

pursue punitive damages against the Friday Firm for its failure to alert it of its claim to the insurance proceeds in question. The predicate act would have established. While the Estate is still intent on pursuing this cause of action against the Friday Law Firm, an upholding of the jury verdict would have made same much easier.

Respondent also falsely accuses the Petitioner of being the "fingerpointer" at the Friday law Firm in the underlying trial in its attempt to now rub elbows with the political brass. It was the *Respondent,* not the *Petitioner,* who first raised the improprieties committed by the Friday Law Firm in a Brief in Support of Motion for Summary Judgment filed early on in the underlying proceedings. The Respondent claimed that the Friday Firm, as attorneys for the Estate, had access to the insurance company's files, and quoted a letter written by James M. Saxton of the Friday Firm on June 27, 1983 to the individual who received the proceeds as follows:

> It appears that factually the policy was issued in your father's name with his Estate as beneficiary; subsequently changed to name you as the owner and beneficiary; then subsequently changed to rename your father as owner and his Estate as beneficiary.

The deposition of Mr. Saxton was quoted as follows:

> [The two memorandums contained in the insurance company's files] both contain language to the effect that the beneficiaries of the Estate may have a potential claim to the life insurance proceeds. . . [*See* Respondent'Appendix, 1a-7a and page 1a of this reply brief.]

The Respondent thereafter concludes in said pleading:

> It is undisputed that the attorneys for the Estate of J.P. Stoltz had knowledge of the Estate's potential claim to the proceeds of the life insurance policies at issue in this lawsuit no later than June 27, 1983. Notice or knowledge of an attorney, acquired during the time he was acting within the scope of his employment, is imputed to his client.

The Petitioner countered this rule of law by proving that the various conflicts of the Friday Law Firm prohibited the imputation of said knowledge to the Estate. However, the Petitioner points these matters out to this court at this time to conclusively show that even the *Respondent* itself has admitted, through its pleadings, that the Friday Law Firm was an interested party in the outcome of these proceedings.

V.

THE REPUTATION AND CLIENT LIST OF THE FRIDAY LAW FIRM, AND PRIOR DECISIONS OF THE ARKANSAS SUPREME COURT INVOLVING SAID FIRM, ARE IRRELEVANT.

Respondent advances as a basis for denying the Petitioner's Petition that the Friday Law Firm is the State's largest firm and that Mr. Herschel Friday is a fine lawyer and a fine man, and that the Friday Firm's clients include many banks and leading businesses. Counsel for Petitioner wholly concurs, but said assertion totally misses the issue. There is no assertion anywhere in the Petitioner's Petition that the Friday Firm is disreputable, or that either Mr. Friday or Judge Holt committed a crime. Such is not alleged, and such is not the standard.

But what they did, under the circumstances, *was* and *is* improper. It creates the appearance of an impropriety, and casts a

cloud over these proceedings that impinges on the integrity of the judicial system. The operative facts stand on their own and speak for themselves. It was not the Petitioner who created this factual scenario, and the Petitioner refuses to feel defensive about bringing same to light.

Likewise, Respondent misses the boat when it begins to preach about other cases decided by the Arkansas Supreme Court wherein the Friday Firm was an interested party. Such an argument again totally misses the thrust of the issue at hand. The case at bar, and the *appearance of an impropriety* created by the facts surrounding same, must stand on their own. The other cases cited by Respondent contain no applicable law to guide this Court, and the facts of same are an attempt to go outside the record. In short, they are irrelevant.

In the first place, none of those cases cited by the Respondent have near the capacity to impugn the Friday Firm as the case at bar. The Friday Firm is not just counsel of record, or even a party-Defendant, in the case at bar. Here, the Friday Firm refused to disclose a claim to a client due to the potential downside of fulfilling its fiduciary obligation, *i.e.* causing numerous other clients it was representing, in the fact or irreconcilable conflicts of interest, to be sued, along with itself.

In the second place, the cases specifically cited and discussed by Respondents do not deal with a decision on the merits of a substantive claim adverse to the Friday Firm. They deal with instances where Summary Judgments were either upheld, or reversed, so that said proceedings went to trial on the merits. In fact, the only case where the Friday Firm was more than an attorney of record is *Pope County v. Friday, Eldredge and Clark*, 313 Ark. 83, 852 S.W. 2d 114 (1993) which simply held that a legal malpractice case could proceed on the merits and was not barred by limitations. The underlying litigation is still pending. If one were to take the Respondent's approach, one could argue that there was

the opportunity to "pick and choose" which cases were picked for favoritism and in what manner said favoritism was craftily disbursed.

In the third place, a computer search of cases involving the Friday Firm wherein either Judge Holt, or his Uncle, the Honorable Frank Holt, actually *wrote* the Opinion, indicates numerous times wherein the Friday Firm unequivocably benefited. (*See* Appendix 2a). Petitioner is *not* arguing that in these cases there was a conspiracy to benefit the Friday Firm; he is simply showing the futility of arguing statistics or numbers. How far does it go, and where does it stop? The reason one only has to show the "appearance of an impropriety" is to remove the need to show an *overt* act of favoritism. Same could rarely, if ever, been proven.

Respondent's faulty argument, and the numerous cases involving the Friday Firm it has caused to be cited, can be used legitimately. They prove the Friday Firm has *many* cases pending in front of the Arkansas Supreme court at all times, and it is absolutely improper for the senior partners of said firm to privately socialize with its Justices at *any* time.

CONCLUSION

The Petitioner's statements are correct. The facts stand on their own, and raise the appearance of an impropriety. There is no difference in what transpired here and the Chief Justice of the Colorado Supreme Court going on repetitive snow skiing excursions at a private and exclusive lodge with the senior partner of the largest law firm in Denver while a matter of utmost significance to said firm was pending, and on which said Chief Justice was the designated author of the applicable Opinion.

The Friday Firm indicated , at the same time these excursions came to light, that it believes the Arkansas Supreme Court's Opinion insulates if from exposure to the Estate in the proceedings

currently being pursued against that firm. Said firm will still try to use said Opinion offensively, in the Estate's case against it, if this Petition for Writ of Certiorari is denied. Something about these facts and circumstances is improper to anyone who will listen.

The facts asserted by the Petitioner will be independently verified. The proceedings before the Arkansas Supreme Court should have been stayed until this matter was independently investigated. The only way to remove the cloud, and let this man rest in peace, is to have this matter reheard by 7 impartial Justices appointed by the Governor of the State of Arkansas. It has been done before under circumstances not as compelling as those present in the case at bar.

Finally, the issue is *not* the potential impact "doing what is right" may have on other cases, or the reputation or client list of the individual/entities involved. At stake is the right of all citizens to receive fair and impartial reviews from a judiciary *whose impartiality cannot be questioned.* This is not a situation where a State Supreme Court simply misapplied that State's law; the Petitioner's constitutional right to due process has been violated. The Petitioner seeks the only means of redress available to him, and asks that this Court not turn its back on him.

Respectfully submitted,

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APPENDIX A — PERTINENT PORTIONS OF JOHN PEACE'S MEMORANDUM FOR FIRST PYRAMID LIFE DATED JANUARY 18, 1978

RELEVANT FACTS

First Pyramid issued a $1,950,000 life insurance policy insuring the life of James Patrick Stoltz ("the insured"). There is some confusion over who owned the policy and also over who is the beneficiary. Some evidence points to the fact that the insured's estate ("the estate") is the beneficiary (the policy itself appears to name the estate). . . .

However, if First Pyramid makes payment to the son, and a Court later found that the decedent intended the estate to be the beneficiary, I believe the estate could show that it had been damaged by the face amount of the policy which it did not receive. This is what happened in the *Sovereign Camp* case mentioned above.

APPENDIX B — CASES

Arkansas Alcoholic Beverage Control Bd. v. King, 275 Ark. 308, 629 S.W.2d 288 (1982);

Gipson v. Brown, 288 Ark. 422, 706 S.W.2d 369 (1986);

Smith v. Nelson, 255 Ark. 641, 501 S.W.2d 769 (1993);

Super X Drug Corp. v. Knight, 263 Ark. IV-90 (not for publication);

Baxter County Newspapers v. Medical Staff of Baxter General Hospital, 273 Ark. 511, 622 S.W.2d 495 (1981);

Lambert v. Snelling & Snelling, Inc., 253 Ark. 1008, 490 S.W.2d 116 (1973);

Madison Bank & Trust v. First National Bank of Huntsville, 276 Ark. 405, 635 S.W.2d 268 (1982);

Pearson v. Lake Lawrence Pulpwood Co., 247 Ark. 776, 447 S.W.2d 661 (1969);

Voss v. Wara's Pulpwood Yard, 248 Ark. 465, 452 S.W.2d 629 (1970);

Cherokee Village Homeowners Protection Assoc. v. Cherokee Village Road and Street Improvement Dist. No. 1, 248 Ark. 1055, 455 S.W.2d 93 (1970);

First Federal Savings & Loan Assoc of El Dorado v. Union Fidelity Savings & Loan Ass'n., 257 Ark. 199, 515 S.W.2d 75 (1974);

Appendix B

Valley Metals, Inc. v. A.O. Smth - Inland, Inc., 264 Ark. 341, 572 S.W.2d 138 (1978);

Knopf v. Knopf, 264 Ark. 946, 576 S.W.2d 193 (1979);

Sugg v. Continental Oil Co., 270 Ark. 882, 608 S.W.2d 1 (1980);

Daniels v. City of Forth Smith, 268 Ark. 157, 594 S.W.2d 238 (1980);

Barentine v. Gleghorn Oil Co., 254 Ark. 182, 492 S.W.2d 242 (1973);

Cople v. Kroger, 260 Ark. N-468;

Teer v. Central Maloney, Inc., 1979 WL805;

Dicks v. Noff, 255 Ark. 357, 500 S.W.2d 350 (1973).